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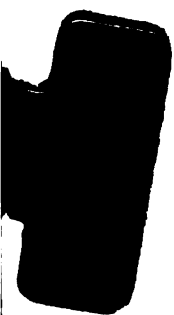
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EDITED BY

JAMES KIRBY, Q.C., D.C.L., LL.D.

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THE LEGAL NEWS.

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JANUARY 1, 1897.

No. 1.

CURRENT TOPICS AND CASES.

The year 1896 deserves a white mark in the calendar of the judges. Among the thirty-six superior judges of Quebec Province, including six in the Court of Appeal and thirty in the Superior Court—the Vice-Admiralty Judge at Quebec and the two judges of the Circuit Court at Montreal might also be included—not a single death occurred. In fact, the year elapsed without change of any kind in the judicial world, except the retirement of Mr. Justice Baby from the Court of Appeal and the appointment of Mr. Justice Ouimet in his stead. The retired judges were equally fortunate, no death having occurred among the seven ex-members of the Bench. By a singular coincidence the Bench in England was equally exempt from mortality in 1896, not a single vacancy having been created by death, although three ex-judges passed away, namely, Justices Blackburn, Grove and Denman.

Among the members of the Provincial Bar the deaths in 1896 were comparatively few in number, the principal

members who have died in Montreal being Mr. L. W. Marchand, Q.C., Clerk of Appeal; Mr. A. H. Lunn, Mr. Louis Laflamme, and Mr. Euclide Roy.

The New Year's honours, so far as colonial judges are concerned, have been wafted to Hong Kong and the Punjab, and Canada is not mentioned in the list. The Chief Judge of the Chief Court of the Punjab and the Chief Justice of the Supreme Court of Hong Kong have been knighted, and one Scottish judge, Lord Kinnear, receives a peerage. We hope to be able to record before long that the Acting Chief Justice of the Superior Court at Montreal in this Province has received the distinction which was accorded to Chief Justice Casault while filling a similar position at Quebec.

Real estate agents are distinguished for the perseverance with which they beset persons who may be supposed to be willing to sell a piece of land or other property. It is extremely desirable, therefore, that in the matter of remuneration and commissions they should be kept within the rules which apply to ordinary contracts, and that they should not be permitted to create so-called customs or usages which would give them rights superior to other persons who are ready and anxious to give their services for a consideration. In *Plummer v. Gillespie*, the pretension of the real estate agent went so far as to allege that wherever a sale is brought about by the agent having called the attention of the purchaser to a property, the agent should be entitled to a commission, although the owner was not aware of his intervention. If this were law, the result might be an unseemly scramble among real estate agents of the locality whenever a piece of property was, or was supposed to be, in the market. Mr. Justice Archibald very naturally rejected the plaintiff's preten-

sion, remarking, "I cannot think that a custom of that character can be binding in law. Unless, either expressly or tacitly, the proprietor has given authority to an agent to sell, I cannot adopt the rule that he incurs the obligation of paying a commission."

Another case of interest, decided by the same learned judge, is *Cusson v. Delorme*. In this case the plaintiff, by mere inadvertence and in ignorance of the line of his property,—ignorance which seems to have been shared by his neighbour—built his wall a few inches beyond the true division line as subsequently ascertained. He had called his neighbour in to see the line drawn, and no objection was made, but after the wall was erected the neighbour complained of the encroachment, and asked for the demolition of the wall. The value of the land taken does not appear to have been proved, but it is certain that it was extremely small, while, on the other hand, the cost of the wall was far from being inconsiderable. The court, in view of the fact that there had been something like acquiescence and renunciation of right on the one hand, and that the maxim "*de minimis*," etc., might almost be applied on the other, declined to maintain the action for demolition.

The Society of Comparative Legislation, founded in 1894, has issued the first number of the journal the main object of which is to record the result of its researches. Half of the number is occupied by a review of the legislation, in 1895, of the sixty legislatures throughout the empire. At the suggestion of the society, a number of questions were recently addressed by Mr. Chamberlain to the colonies, requesting information as to their modes of legislation and the form of their laws. The answers obtained are published in the first number of the society's journal, and form a valuable addition to the accessible information on the subject.

The Roentgen rays have already proved to be of much service in judicial investigations, and have recently been used to correct a mistake of justice. A man was convicted of stealing a florin, and was sentenced to nine months' imprisonment. He maintained that the coin had accidentally slipped down his throat. The X rays were applied and the coin was disclosed to view, with the result that the prisoner was discharged. We presume there was no suspicion in this case that the coin was swallowed, after the accusation of theft was made, for the purpose of manufacturing evidence in favor of the prisoner's pretension.

SUPREME COURT OF CANADA.

OTTAWA, 9 Dec., 1896.

Quebec.]

SENESAO v. VERMONT CENTRAL RY. CO.

Appeal—Finding of court below—Absence of proof—Interference with, on appeal—Railway company—Negligence.

An action was brought by S. against a railway company for damages from loss of property by fire from a woodshed on the company's premises spreading to the adjoining property of S. The Superior Court and the Court of Review both held that the origin of the fire was a mystery and that it was not proved to have been caused by any fault of the company. On appeal from the decision of the Court of Review (Q. R., 9 S. C. 319) :

Held, that as there was nothing to show that the judgment appealed from was clearly wrong or erroneous the Supreme Court would not interfere with it.

Appeal dismissed with costs.

Geoffrion, Q.C., for the appellant.

Greenshields, Q.C., and *Lasfleur*, for the respondent.

9 Dec., 1896.

Ex. Adm.]

THE SHIP "CUBA" v. McMILLAN.

Maritime law—Collision—Rules of the road—R. S. C. c. 79, s. 2, ss. 15, 16, 18, 19, 21 to 23—Compliance with signal—Negligence.

The steamship "Elliott," from Charlottetown to Sydney, C.B.,

arrived off Law Point in Sydney Harbour about 7.30 p. m., and stopped for a pilot, who came aboard and headed her up channel at full speed on a course towards the northerly side, her proper course in a narrow channel. After proceeding awhile the mast-head light of a vessel was seen over the southeast bar moving in a northerly direction across the mouth of the harbour. Presently both side lights became visible also, and all three were seen for about ten minutes a point, or a point and a half, on the port bow. This vessel was the "Cuba," outward bound, and she saw the "Elliott's" red light about two miles off a point or point and a half on her starboard bow. Each vessel soon made out the other's course.

The "Elliott" seeing that the "Cuba" kept her bearings for some time, with both side lights always visible, further ported her helm, and the "Cuba" went further to starboard. When they were about a quarter of a mile apart, the "Elliott's" helm was put hard to port, and the "Cuba" turned sharply to port, shutting out her red light. When about two cable lengths away the "Cuba" signalled by two blasts of her whistle that she was going to port. The "Elliott" then reversed her engines, but perceiving almost immediately that the bow of the "Cuba" was turned to starboard, instead of to port, set them going again at full speed, hoping to cross clear of the "Cuba's" bow. The vessels were, however, too close together, and the "Cuba's" bow struck the "Elliott" a little abaft amidships.

Held, that from the evidence and finding of the local judge in Admiralty, Nova Scotia District (5 Ex. C. R. 135), the vessels were not end on or "meeting" ships nor "crossing" ships with the lights red to green or green to red, but they were "passing" ships, one side-light of the "Elliott" being seen dead ahead of the "Cuba." In such case there is no statutory rule imposed as unless the course is changed, the vessels must go clear of each other; it is governed by the rules of good seamanship. The "Elliott," therefore, violated no statutory rule in porting her helm, and acted consistently with good seamanship.

Held, further, that the "Cuba" was in fault in persisting, without good reason, in keeping on the wrong side of the fairway; in starboarding her helm when it was seen that the "Elliott's" was hard to port with the vessels rapidly approaching; and, after signalling that she was going to port, in reversing her engines whereby her head was turned to starboard.

Held, also, that though the "Elliott" may have violated the statutory rule requiring her to slacken speed or stop and reverse if necessary when approaching another vessel so as to involve risk of collision, yet as the omission to do so would have led to no injurious consequences if the "Cuba" had acted in conformity with her signal, she was not for that reason responsible for the accident. R. S. C. ch. 79, s. 5.

The rule as to steam vessels keeping to their starboard side of a narrow channel does not override the general rule of navigation. The "Leverington" (11 P. D. 117), followed.

Appeal dismissed with costs.

Mellish, for the appellant.

Harris, Q.C., for the respondents.

Nova Scotia.]

9 Dec., 1896.

McLAUGHLIN v. McLELLAN.

IN RE ESTATE OF JOHN A. P. McLELLAN, deceased.

Will—Execution of—Testamentary capacity—Mental condition of testator.

In proceeding before a Court of Probate to prove a will in solemn form, evidence was offered to show that the testator when he gave instructions for the preparation of the will and when he executed it, was not possessed of testamentary capacity.

Held, affirming the decision of the Supreme Court of Nova Scotia (28 N. S. Rep. 226) that although the testator suffered from a disease that induced drowsiness or stupor, and when he gave the instructions and executed the will was in a drowsy condition, and there was difficulty in keeping his mind in a state of activity so as to ascertain what his wishes were, yet as it appeared that he understood and appreciated the instructions he gave and the document itself when read over to him, it was a valid will.

Appeal dismissed with costs.

Mellish for the appellant.

Lawrence for the respondents.

Ontario]

9 Dec., 1896.

CITY OF TORONTO v. C. P. RY. Co.

Municipal corporation—By-law—Assessment—Local improvements—Agreement with owners of property—Construction of subway—Benefit to lands.

An agreement was entered into by the corporation of Toronto

with a railway company and other property owners for the construction of a subway under the tracks of the company ordered by the railway committee of the Privy Council, the cost to be apportioned between the parties to the agreement. In connection with the work a roadway had to be made, a part of which fronted on the company's lands, and which when made, cut off to some extent the lands from abutting as before on certain streets, and a retaining wall was also found necessary. By the agreement the company abandoned all claims to damages for injury to its lands by construction of the works. The city passed a by-law assessing on the company its portion of the cost of the roadway as a local improvement.

Held, that to the extent to which the lands of the company were cut off from abutting on the streets as before the work was an injury, and not a benefit to such lands, and therefore not within the clauses of the Municipal Act as to local improvements; that as to the length of the retaining wall the work was necessary for the construction of the subway and not assessable; and that the greater part of the work, whether or not absolutely necessary for the construction of the subway, was done by the corporation under the advice of its engineer as the best mode of constructing a public work in the interest of the public, and not as a local improvement.

Held, further, that as the by-law had to be quashed as to three fourths of the work affected, it could not be maintained as to the residue which might have been assessable as a local improvement if it had not been coupled with work not so assessable.

Notice to a property owner of assessment for local improvements under sec. 622 of the Municipal Act, cannot be proved by an affidavit that a notice in the usual form was mailed to the owner; the court must, upon view of the notice itself, decide whether or not it complied with the requirements of the Act.

In the result, the judgment of the Court of Appeal (23 Ont. App. R. 250) was affirmed.

Appeal dismissed with costs.

Robinson, Q.C., and *Caswell*, for the appellant.

Armour, Q.C., and *MacMurchy*, for the respondent.

QUEEN'S BENCH DIVISION.

LONDON, 16 December, 1896.

HINDLE v. BIRTWISTLE (31 L.J.)

*Factory and Workshop Acts—Dangerous parts of machinery—
Omission to fence—Liability.*

Case stated by the Recorder of Blackburn.

Messrs. Hindle, who were cotton manufacturers, were convicted by the magistrates of Blackburn for neglecting to fence a certain dangerous part of the machinery in their factory—to wit, the shuttles. It appeared that a shuttle flew out of one of the looms in the factory and injured a weaver, but the evidence showed that such an accident might arise either from negligence of the weaver or from some foreign substance accidentally getting into the shuttle race, or from some defect in the yarn. By section 5 of the Factory and Workshop Act, 1878, and section 6 of the Factory and Workshop Act, 1891, "all dangerous parts of the machinery" in a factory are required to be securely fenced.

The Recorder quashed the conviction.

The Attorney-General (Sir R. Webster, Q.C.), H. Sutton and L. Sanderson for the appellant.

Sir E. Clarke, Q.C., and E. Sutton for the respondents.

THE COURT (WILLS, J., and WRIGHT, J.,) were of opinion that the above sections were not restricted to machinery which was dangerous in itself, but applied equally to machinery from which, in the ordinary course of working, danger might reasonably be anticipated. They therefore remitted the case to the learned Recorder.

COURT OF APPEAL.

LONDON, Nov. 28, 1896.

Before LORD RUSSELL, L. C. J., LINDLEY, L. J., SMITH, L. J.

In re ROBINSON. WRIGHT v. TUGWELL. (31 L. J.)

Charity—Endowment of Church—Continuing condition—Ecclesiastical Law—Public worship—Preaching—Black gown.

Appeal from a decision of NORTH, J.

Mrs. Robinson by her will gave a legacy of 1,500*l.* towards an

endowment for a proposed church at Boscombe, Bournemouth, and, amongst other stipulations, she made it an 'abiding condition that the black gown shall be worn in the pulpit unless there shall be any alteration in the law rendering it illegal,' and that any new incumbent should sign the conditions. The church was built, and dedicated to St. John the Evangelist, and in 1895 it was consecrated. In 1891 a question arose, on the further consideration of an action brought to administer the estate of the testatrix, how the legacy, if payable, was to be paid; and North, J., held that the condition as to the black gown was not impossible, but that it was a continuing condition, and that the 1,500*l.* must be carried over to a separate account, with liberty for the incumbent to apply for payment of the income to himself if he performed the conditions. The case is reported 61 Law J. Rep. Chanc. 17; L. R. (1892) 1 Chanc. 95.

The Rev. S. A. Selwyn, the incumbent, now applied for payment to him of the dividends which had accumulated since 1891, and for an order that future dividends should be paid to him as long as he remained incumbent. The executor objected to this on the ground that Mr. Selwyn had not signed the conditions, and that he did not preach in a black gown. Mr. Selwyn replied that he was ready to sign the conditions, but that the wearing of a black gown was illegal, and that that condition therefore failed, so that he was entitled to the dividends as a legacy of personalty released from the condition. North, J., refused the application, and the incumbent appealed.

Their Lordships dismissed the appeal. They said that there was no statute, rubric, advertisement, injunction, or canon which prescribed that to preach in the black gown was illegal; and for three centuries down to a comparatively recent date there had been continual use of it by clergymen of the Church of England when preaching. The case of *Ridsdale v. Clifton*, 46 Law J. Rep. P. D. & A. 27; L. R. 2 P. Div. 276, did not decide that the use of the black gown in preaching was illegal. It contained no allusion to the black gown or to preaching. The sermon did not form part of the administration of the sacrament of the Lord's Supper. Neither could preaching be regarded as one of the other rites of the church within the words of the advertisement of Queen Elizabeth. The warrant in law for the black gown was constant user for centuries.

THE LEGALITY OF THE BLACK GOWN.

The decision of the Court of Appeal last week, in *Wright v. Tugwell*, affirming the legality of the black gown in the Anglican pulpit, is another illustration of the fact that the Queen, through her Courts, is supreme over all ecclesiastical persons and things within the realm. As regards the Church of England, this supremacy springs primarily from the Act of Supremacy, interpreted and corroborated by the *articuli cleri*. Apart from this aspect of the case, the affirmance by the Court of Appeal of the legality of the black gown possesses very considerable intrinsic legal interest. It limits definitively the range of the judgment of the Privy Council in *Ridsdale v. Clifton* to the vestments which may be worn during the administration of the Holy Communion, and, what is more important still, it involves the conclusion that preaching is no part of the Communion Office. The former of these results—if one may say so without any disparagement to the persistence and ingenuity with which the contrary opinion was argued—was inevitable. The *obiter dicta* of the Privy Council in the *Ridsdale Case* may go farther. But the *ratio decidendi* is clearly confined to the celebration of Communion. The severance which the Court of Appeal have now effected, however, between the sermon and the Communion Office is distinctly startling. But we believe it to be legally and historically justifiable, not to speak of the notorious facts as to the times and seasons and the places in which the sermon in this country used to be delivered. The result, however, may be to give a decided impetus to the use of other and, as some might think them, more exceptionable vestments than the black gown. Possibly it may raise the whole vestment controversy, which many ecclesiastical experts regard as the next issue on which the ecclesiastical Courts will have to adjudicate.—*Law Journal*, (London).

INTRAMURAL INTERMENTS.

Both in Canada and in England the decease of an archbishop and his interment in his cathedral-church, have directed attention to the above subject. The following from the *London Law Journal*, will therefore be of interest :—

The revival in the case of the lamented Primate of the mediæval custom of burying a prelate in his cathedral church natur-

ally suggests a consideration of the past and present position of the law in reference to intramural interments. At common law every parishioner had a right to interment in the parish churchyard. It does not seem probable that at any time a common law right existed to burial within a church. In fact, it is most probable that the modern practice of placing cemeteries without the limits of the town actually existed in early Saxon days. Some time or other, however, before the time of Edward the Confessor, the practice of intramural interments had sprung up and was checked by a canon of uncertain date (Spel. Conc. 559, n. 9), which, whatever its legal force, practically regulated the law until modern times. It laid down that to prevent the conversion of churches into charnels, the privilege of intramural burial should be restricted to priests and holy men. At common law the parson only had the power to give permission for such burial, and even he could only give permission for the particular burial about to take place, and could not confer a general right. To this rule there was, however, an exception. Although before the Norman epoch intramural interments took place within the nave, and it was only after Lanfranc's time that vaults within the chancels seem to have been sanctioned, the right of burial in a chancel may be at common law prescribed as belonging to a messuage. "Upon the foundation of freehold the common law has one exception to the necessity of the leave of the parson—namely, when a burying place within the church is prescribed as belonging to a manor-house, the freehold of which they say is in the owner of the house, and that by consequence he has a good action at law if he is hindered to bury there." (Gibs. 453; Brooke Little, 'Law of Burials,' p. 20). The incumbent could not at common law grant any part of the church or churchyard for the purpose of a vault for an individual or a family without a faculty. To come to modern legislation. So far as modern churches are concerned the practice is chiefly regulated by 58 Geo. III. c. 45, s. 80, and 11 & 12 Vict., c. 63, s. 83 (repealed and re-enacted by section 43 of the Public Health Act, 1875, part 3, schedule 5), which latter Act forbids the making of any vault or grave within any church built subsequently to August 31, 1848. As to other churches, under 14 & 15 Vict., c. 185, which applied only to the metropolis, section 5, all burials in any place prohibited under that Act by an Order in Council are prevented, an

exception subject to a license from the Secretary of State being made in favour of any persons possessing by any faculty, usage, or otherwise, a right of interment in any church, churchyard, or graveyard, excepted by such Order. Section 8 exempts from these provisions Westminster Abbey and St. Paul's, subject to the royal assent being obtained. By 16 & 17 Vict., c. 134, s. 37, which applies to the burial of the dead outside the metropolis, no burial is to take place within any church, chapel, churchyard, or burial place, after an Order in Council closing the same. Section 4 of this Act makes a provision identical to that contained in the Metropolitan Act as to the reservation of existing rights. Canterbury Cathedral being closed under the provisions of this Act, the late Primate will be buried by the permission of a family whose prescriptive rights have been reserved under this last mentioned section, with the consent of the Secretary of State.

HANDCUFFING ACCUSED PERSONS.

There is apparently a vast amount of ignorance in the police force throughout the country with reference to the power of a constable to handcuff an accused person arrested on suspicion; in other words, any person who has not yet been put upon his trial. In another part of this week's issue will be found a note of a case in which the question was raised as to the conduct of the police in chaining prisoners who had not yet been put upon their trial when they are being taken through the streets. A prisoner complained before the Manchester magistrates that this had been done to him, and Mr. Armitage (the chairman) characterized this degrading system as being illegal and most improper. Mr. Armitage is quite right. As far back as 1825, it was laid down in *Wright v. Court*, 4 B. & C. 596, that handcuffing could only be justified in cases where it is necessary to prevent the prisoner from escaping when he has attempted to escape. In the unreported case of *Norman v. Smith*, tried at the Manchester Assizes in 1880, a plaintiff was awarded £15 damages for being wrongfully handcuffed. Last year in *Rej v. Taylor*, 59 J. P. 393, the Lord Chief Justice observed that "handcuffing was only justifiable where reasonable necessity existed, and if it were resorted to in the absence of such necessity, the person so treated might bring an action to recover damages for such a grievous indignity." The grievance of which the Manchester prisoners

complained was equally degrading and the indignity equally grievous. Where the prisoner is a man of notoriously bad character, or violent or dangerous, or where he threatens or assaults the constable, or where, perhaps, the offence of which he is charged is of a grave nature, the constable would be justified in handcuffing him. In the absence of such reasonable grounds, prisoners should not be handcuffed. In cases of drunkenness and trivial offences, they certainly should not be handcuffed unless they come within the exceptions mentioned above. Females and aged or infirm persons should not be handcuffed. It will be permissible, however, to depart from these limitations where there is any attempt made to escape.—*Justice of the Peace.*

RECENT UNITED STATES DECISIONS.

Damages.

One who procures the discharge of an employee not engaged for any definite time, by threatening to terminate a contract between himself and the employer which he had a right to terminate at any time, is held, in *Raycroft v. Tayntor* (Vt.) 33 L. R. A. 225, to be not liable to an action by the employee for damages, whatever motive may have prompted him to procure the discharge.

Express company.

The power of an express company to establish limits beyond which it will not collect or deliver packages carried or to be carried by it is sustained, in *Bullard v. American Express Co.*, (Mich.) 33 L. R. A. 66, as against a person who has knowledge of such limits; and it is held immaterial that the limits extend farther from the office in one direction than in another. A note to the case reviews the authorities on the duty of an express company as to the delivery and collection of packages.

Negligence.

An intoxicated person who refuses to go into a car when there is standing room inside, but goes down upon the steps of the platform without the knowledge of the conductor or other person in charge of the train, after he has been several times requested to come inside, and loses his balance when the car lurches in rounding a curve, is held, in *Fisher v. West Virginia & P. R. Co.* (W.

Va.) 33 L. R. A. 69, to be guilty of such negligence on his part as will preclude any recovery against the carrier. His intoxication is held to be no excuse for his contributory negligence.

Liability of a street railway company for the injuries received by a young woman who became suddenly ill while on the car and, after twice requesting the conductor to stop it so she could get off, and on his failing to do so, became frightened and dazed on becoming worse, and staggered towards the rear of the car, and fell through the door unconscious, is held, in *McCann v. Newark & S. O. R. Co.* (N.J.) 33 L. R. A. 127, to be a question for the jury, involving questions of negligence of the carrier, her contributory negligence, and the proximate cause.

The liability of an electric railway company for the death of a boy less than eight years old who was struck and killed by a car in crossing the street behind a car that was standing, when no signal of the approaching car was given, although he did not look for it, is held, in *Consolidated Traction Co. v. Scott* (N. J.) 33 L. R. A. 122, to present questions for the jury as to the negligence and contributory negligence; and the court held that it was not *per se* negligence for one to cross the track of a street railway in a city street without stopping to look and listen.

Telegraph company—Libel.

The liability of a telegraph company for sending a libellous message is adjudged in *Peterson v. Western Union Telegraph Co.* (Minn.) 33 L. R. A. 302, where the message was on its face susceptible of a libellous meaning and there was evidence to show that it was published maliciously.

Tomb, Rights in.

The owner of a tomb who has permitted the remains of the dead to be deposited therein on his assurance to the relatives that it might be a permanent resting place is held, in *Choppin v. Dauphin* (La.) 33 L. R. A. 133, to be without rightful authority to cause the removal of the remains therefrom.

A trademark in the term "Syrup of Figs," for a medicine described as the laxative and nutritive juice of figs, is denied protection in *California Fig Syrup Co. v. Frederick Stearns & Co.*, (C. C. App. 6th C.) 33 L. R. A. 56, on proof that the fig juice was not an essential part of the medicine, but was used merely as a basis for the name.

LONGEVITY OF LAWYERS.

The patriarchal age of ninety-seven, to which Sir James Bacon had attained, will recall to recollection some well-known instances of longevity in the cases of eminent members of the Bench and Bar. Sir Edward Coke, who died in his eighty-third year, was seventy-eight when he suggested, in 1628, the famous Petition of Right, which he succeeded in carrying through the House of Commons, whose chair he had filled in 1593—five-and-thirty years previously. Again, the famous Serjeant Sir John Maynard, in 1689, who, in his eighty-ninth year, was selected, notwithstanding his great age, to fill the post of First Commissioner of the Great Seal. Two references made by Sir John Maynard to his years are worthy of immortality. On one occasion, when arguing before Jeffreys, he was told by that judge that “he had grown so old as to forget his law.” “Quite true, my Lord,” was the reply, “I have forgotten more law than ever you knew.” Again, when paying homage as leader of the Bar to William III., the King, amazed at seeing a man who had been a conspicuous member of Parliament in the reign of James I., said, “Mr. Serjeant, you must have survived all the lawyers of your standing.” “Yes, sir,” said the old man, “and but for your Highness I should have survived the laws, too.” In the present century, two occupants of the woolsack have reached their ninetieth year. Lord Lyndhurst was born in 1772; he died in 1863. Lord Brougham was born in 1778; he died in 1863. On the Irish Bench and at the Irish Bar there have been some striking instances of longevity. The Right Hon. James Fitzgerald, who filled the post of Prince Serjeant, an office now abolished, which had the precedence of the Attorney-Generalship, was upwards of ninety at his death in 1830. Again, the Right Hon. Thomas Lefroy, who was Lord Chief Justice of Ireland from 1852 to 1866, was, on his retirement from the Bench in the latter year, ninety-one years old. He survived till 1869. Lord Norbury, an Irish Chief Justice of the Common Pleas from 1800 till 1827, died in 1831, in his ninety-second year. The first Lord Plunket, an Irish Lord Chancellor, lived to enter on his ninetieth year, and the late Right Hon. Francis Blackburne was in his eighty-sixth year when, in 1866, he was appointed for the second time to the post of Lord Chancellor of Ireland.—*Law Times (London)*,

GENERAL NOTES.

THE DECLINE OF WINDING-UP BUSINESS.—A tone of sadness pervades the Inspector-General's report in winding-up. Vice, not virtue, seems to triumph. Companies create fictitious capital to obtain credit from the trading community, others begin business knowing their capital insufficient; traders form one-man companies to evade bankruptcy; the public examination section is a dead letter; worst of all, companies do not want to be wound up compulsorily; only the small fishes come to the net. This is true. For fifty companies that are wound up by the Court, there are 900 that wind up voluntarily. Even if a winding-up petition is presented it is withdrawn. Anyone who attends petition day in the winding-up Court must be struck with this. Petition after petition is settled. Sometimes, if there is a suspicion of collusion, a petition stands over to see if another creditor will take it up; but another creditor never does. Indeed, Mr. Justice Williams has more than once expressed an opinion that the chief utility of a winding-up has gone with the public examination. But it is in vain to lament. If the annals of winding-up, and of bankruptcy too, testify to anything, it is to the preference of Englishmen, whether they are shareholders or creditors, for managing their own affairs; and it is a healthy instinct.—*Law Journal (London)*.

PROXIES ON A SHOW OF HANDS.—The old common law mode of voting by show of hands is a rough-and-ready way of taking the sense of a meeting, but it has the great merit of enabling the company to get quickly through business which would be intolerably delayed if the whole constituency of the company had on each occasion to be consulted. The effect of admitting proxies on a show of hands, as was done *In re Bidwell Brothers*, would be to introduce this evil in a modified form. If one member brought proxies for use on a show of hands, another would do so too; each would hold up a sheaf of proxies, and the chairman would have the task of examining each proxy and holding an informal poll. Voting by show of hands would vanish. It is therefore matter for congratulation that the Court of Appeal should have vetoed this new-fangled practice—*Ernest v. The Roma Gold Mines Company*. What weighed with the Court in *In re Bidwell Brothers* was, that if the proxies there had been disallowed there would not have been enough to demand a poll. The answer is that if shareholders will not take the trouble to go to a meeting, they must expect those who do to get an advantage over them.—*Ib.*

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CURRENT TOPICS AND CASES.

The year begins with some changes on the English bench. Lord Justice Kay, after an illness of several months, has been compelled to retire from the Court of Appeal. Lord Justice Kay was appointed to the bench in 1881, as a judge of the Chancery Division, and some years ago was promoted to the Court of Appeal. His successor, Mr. Justice Chitty, has also been promoted from a lower court, he having been appointed to the bench in the same year as Lord Justice Kay. He is sixty-eight years of age, and his judicial service having exceeded fifteen years he is now entitled to retire with a pension; but instead of retiring he proceeds to the distinguished position of a Lord Justice of Appeal. Lord Justice Chitty is descended from a line of legal ancestors, both his father and grandfather being prominent lawyers. Mr. Byrne, Q.C., is to fill the vacancy created by Mr. Justice Chitty's promotion.

It is not generally known that by a curious survival from a more ancient order of things, juries in felony cases in England have to be locked up when the case is not concluded at the time the court rises. The judge has no

discretion. It is surprising that a rule apparently so unnecessary, and in some cases entailing considerable hardship, should have been tolerated so long, and it is equally surprising that when it is at last proposed to modify it by giving the judge a discretion, one of the superior judges writes to the newspapers disapproving of the suggestion. To add to the absurdity, the accused may go out on bail while the jury are kept under lock and key. The distinction between felony and misdemeanour has been wholly abolished in Canada, (article 535, Criminal Code) and in this particular we have anticipated a reform which will probably be adopted before long in England. The distinction, it is stated, has had some strange consequences. In the Tichborne case, for example, the idea of trying the accused for forgery had to be abandoned because it would have been impossible to keep a jury locked up so long. The extract from the Imperial Commissioners' report given by Mr. Justice Taschereau under Article 535 seems to favor the change.

In *Salomon v. Salomon*, the House of Lords, (16 Nov.) reversing the decision of the Court of Appeal, (L. R. 1895, 2 Chanc. 323; 64 Law J. Rep. Chanc. 689), laid down the important principle that where a trader, who is solvent, converts his business into a limited liability company, and all the statutory requirements for the constitution of the company are fulfilled, the court is not entitled to speculate on the motives which induced the trader to turn his business into a company, or to impose conditions as necessary to the validity of the company which are not found in the statutes. The mere fact that the trader is virtually sole owner of the concern, the other shareholders having only a nominal interest, does not authorize the court to rescind the agreement for the sale and purchase of the business. The late Sir Geo. Jessel long ago asked whether any good reason could be assigned why one person should not trade with limited liability. Why

should not a man say, "I wish to start a steam laundry business with £10,000, and I give notice to all the world that I will not be liable beyond that sum." Why should the common law prohibit such a contract? Is a man obliged to risk his whole fortune in any trade he embarks in? The objection seems to be the facilities for fraud which might be provided, but to meet this objection some distinguishing mark might be devised for traders of this class, similar to that proposed by the late Lord Bramwell when he suggested the word "limited" after company titles—a happy thought which was adopted.

The solicitors' managing clerks have an association in London, and on a recent occasion the members had the honour of entertaining at dinner four of Her Majesty's superior judges—Sir Francis Jeune and Justices Kekewich, Romer and Lawrance—as well as several prominent Queen's Counsel. A good many compliments were exchanged between the guests and their hosts, and Mr. Justice Kekewich remarked, in replying to the toast of "Her Majesty's Judges," that he looked back upon the time he spent in a solicitor's office as one of the most pleasant and instructive in his life.

"Duties on Successions" is the title of a useful little handbook compiled by Mr. W. B. Lambe, collector of provincial revenue, Montreal (Wm. Foster Brown & Co., publishers). It contains tables of the duties payable to the treasury department on transmission of property after death, whether by will or intestacy, with the text of the statutes, in English and French, and forms of declarations. The public generally will appreciate this handbook.

Someone has calculated that in order to read the law reports which appear in the United States, a lawyer would have to spend seven or eight hours a day, and keep at it every day of the year. How valuable, then, an

index to this great volume of printed matter! The General Digest, American and English, (Lawyers' Co-operative Publishing Co., Rochester, N. Y.,) now published quarterly, undertakes to do this, and includes also all current case law, English and Canadian. The first part, up to October, 1896, contains five hundred double-column pages.

HOUSE OF LORDS.

LONDON, 11 December, 1896.

CLUTTONS (Appellants) v. ATTENBOROUGH & SONS
(Respondents) 31 L. J.)

Bill of exchange—Cheques payable to 'fictitious or non-existing persons'—Forged indorsement—Fraud—Negligence—Duty to holder.

By a system of fraud extending over eight years the appellants' clerk obtained cheques drawn by the appellants to the order of a non-existing person for work never executed and for goods never supplied. These cheques he stole, and indorsed in the name of a non-existing payee, and paid them to the respondents, pawnbrokers, who gave value for them, partly in money, partly in goods, at intervals during the whole period of eight years. All the cheques were honoured by the appellants' bankers. The appellants sought to recover the proceeds of these cheques from the respondents as money paid under a mistake of fact. Held, that the appellants were not entitled to recover.

Their Lordships (LORD HALSBURY, L.C., LORD MACNAGHTEN, LORD SHAND, and LORD DAVEY) affirmed the decision of the Court of Appeal (64 Law J. Rep. Q. B. 627; L. R. (1895) 2 Q. B. 707), and dismissed the appeal with costs.

CORPORATIONS.—EXPULSION OF MEMBERS.—Relator, a member of a club incorporated for social purposes, being dissatisfied with the rejection of a candidate for membership, sent a circular to the other members, setting forth the rejection and urging the calling of a special meeting. Relator was notified to appear before the board of directors and give an explanation of his conduct. He appeared, was heard, and was expelled. Held, that a mandamus would issue to review the proceedings of the board of directors. *People v. Up-Town Assoc.*, 41 N. Y. Supp. 154.

*THE CASE OF CZYNSKI.**

Criminal proceedings against a man by the name of Ceslav Lubicz-Czynski, on the charge of having had recourse to hypnotic suggestions in order to win the affections of a woman of high social position, and obtain her consent to live with him in illicit intercourse, and subsequently to marry him after he had subjected her to his will, imposed upon her by his power of hypnotization, were recently instituted in one of the higher courts of the city of Munich, Bavaria, and conviction secured on that charge. Hypnotism has figured in courts of justice here and abroad in a number of cases, but only as far as I am aware as a defensive plea, in justification of criminal acts, committed, as claimed, under the influence of the will of some other person, who, by suggestion, made the criminal actor a willingless instrument of criminal design, and compelled the commission of a criminal act, for which the accused could not be held responsible and which he was powerless to resist. But in this case the principal, the hypnotizer, was tried for using his art for illegitimate and criminal purposes, convicted upon the charge, and sentenced to imprisonment, after a protracted trial, upon the evidence and the rendering of opinions of eminent scientists. For the first time, I believe, has hypnotism been thus recognized in legal proceedings as a factor in the human will, as a psychological power for evil, scientifically defined, and with which the administration of justice will have to deal whenever accusation or defence shall resort to the plea of hypnotic influence or suggestion.

The case as tried before a court and jury in Munich, beginning on the 17th of December, 1894, and lasting for three days, is of sufficient interest to medico-legal science for extensive notice. It appears from the record of the proceedings that Ceslav Lubicz-Czynski, a native of Turzenka, District of Warsaw, Russia, Poland, 36 years of age, had lived in Cracow until the year 1890, as private teacher of the French language, where he also figured as an expert in effecting cures by the means of magnetism and hypnotism, a method, as he announced in circulars and advertisements, of his own discovery. He was married, but about that time he left his wife and lived together with a woman by the name of Justine-Marger, with whom he

* Paper read before the Medico-Legal Congress, September 6th, 1895, by Moritz Ellinger, secretary of the Medico-Legal Congress, and printed in the Medico-Legal Journal, New York.

had a child. In 1892 the pair went to Posen, and in that city, as well as in smaller towns of Prussian Poland, he delivered lectures on hypnotism, occultism and cognate subjects. He did not succeed very well, but kept on, gave public exhibitions of his hypnotic power, and claimed to be able to cure every disease however hopeless it may appear. He also gave exhibitions pretendedly for the benefit of charitable objects, but as he invariably pocketed the money himself, he was expelled from Prussia in 1893. In April of that year he transferred his field of operations to Saxony, and its capital, the city of Dresden, where he also announced in the public press the wonderful powers which he possessed and which enabled him to effect wonderful cures.

One of these announcements came under the eye of Hedwig von Zedlitz, a member of one of the oldest families of the German nobility, a spinster, 38 years of age, of unblemished private character and strict religious habits and disposition. She suffered from pains in her head and stomach, and she applied to Czynski for relief. He treated her by placing his hands upon the part of her body, which she pointed out as the seat of pain, and also prescribed medicine for her. The relations of Czynski and his patient grew more intimate with every visit which he made to her rooms, or her visit to his rooms, until their engagement, which, however, was kept secret, because Czynski declared that political considerations demanded it. He told his affianced lady love that he was the last offshoot of a princely family of Lithuania, and for that reason the public announcement of his betrothal and marriage might cause some unpleasantness; a lady of the best Dresden connections with whom he enacted the role of Joseph against Potiphar, might plan revenge, etc. He also claimed to be the last scion of a ducal family, the Prince of Swiatopelk. The engagement with Baroness von Zedlitz induced him also to discharge the woman he lived with, the mother of his child, on the plea that his first wife was coming back, and that he would take steps to secure a divorce, for which purpose he abandoned the Catholic faith and joined the Protestant Church.

At the end of January, 1894, Baroness Zedlitz made a journey to Switzerland and Czynski took up his residence at St. Gallen, from which place the cards announcing the engagement of the parties were sent out. The marriage was to take place in secret, in Munich, for which place the Baroness set out on February 6.

In the meanwhile C. went to Vienna and secured the services of an old acquaintance of his, a certain Stanislaus Wartalsky, promising him a good position on one of the domains of his future wife, assuring him that his wife was in full agreement with what he was doing, and what he wanted his friend to do; namely, to personate a Protestant clergyman and to perform a spurious marriage ceremony. Wartalsky made his appearance as promised, and was received at the railway depot by C. On the day following, Wartalsky was introduced at the Hotel "Europaeischer Hof" to Baroness von Zedlitz as Dr. Wertheman, pastor of the Protestant Church, and on the 8th of February the marriage was duly performed in one of the rooms of the hotel. The pretended Dr. Wertheman wore the robe of a Protestant clergyman. At the table before which the bridal couple kneeled stood a crucifix, with two candlesticks and a ritual, which the clergyman had brought with him from Vienna. Wartalsky, alias Dr. Wertheman, read off an address from a paper, put to the couple the prescribed questions, which they answered with a loud "aye," after which he put the wedding ring on their fingers and pronounced his blessing. There were present as witnesses the Court Jeweller, Paul Merck, a Mrs. Elizabeth Rudolf, companion of the Baroness, and a chambermaid. Wartalsky left a marriage certificate, for which he used the form as prescribed in the diocese of Salzburg, which both of them signed. The words "Catholic religion" were stricken out, and the words "Augsburg confession" substituted. A wedding breakfast followed, during which Wartalsky toasted the duke and duchess, and Czynski showed his wife a telegram which, he said, came from the Austrian Chancellor Kalnoky, conveying congratulations.

When the father and brother of Baroness Zedlitz, the latter of whom held a position in the heraldry office at Berlin, heard of these proceedings, they applied to the police authorities, and a week after the pretended marriage Czynski was placed under arrest.

After a number of protracted examinations, the following indictment was preferred, to the principal points of which Czynski pleaded "not guilty:"

1. To have put Baroness von Zedlitz, by means of hypnotism and suggestion, in a condition of loss of will power, and in which she, without the power of asserting her own will, became subject

to his will, and that he abused her in that condition for illegitimate sexual intercourse.

2. That he induced Wartalsky, by the promise of financial gain, to perform a function which can only be performed by a person properly authorized.

3. That he passed over to the brother of the Baroness von Zedlitz a document which was a fraudulent marriage certificate, for the purpose of securing thereby the financial advantages which the connection with Baroness von Zedlitz, who is a person of considerable wealth, would give him.

The testimony of the witnesses given during the trial is of great interest in a medico-legal sense, but I must confine myself to the principal points, especially to the testimony of the accused and his intended victim, and to some extracts of the opinions of the experts.

The manner of his becoming acquainted with Baroness von Zedlitz, and of his qualifications for the performance of professional cures by training and education, he describes in substance as follows :—

“I was teacher at the gymnasium of Cracow, and in former years a student at the university of that city. I took a great interest in the subject of hypnotism, studied it thoroughly and wrote several books on it. In 1892 I went to Paris, attended the clinical course at the Charité, and obtained a certificate as a student of medicine. Of course, I am not a graduated physician. On account of my books on hypnotism I received from the Roman Academy the diploma of *M.D. honoris causa*. Before the Medical Society of Constantinople I delivered lectures on hypnotism. I am the author of twenty-two books.” He also claims to be a member of the Paris Société des études ésotériques.

In his treatment of Baroness von Zedlitz he had applied the method learned in Paris for the cure of headaches, but denies that he ever put her into a hypnotic condition. He never had put his hand upon the stomach of the patient, and she had never taken, during his treatment, a recumbent position, but always sat in her chair. To the question of Dr. Schrenck whether he ever made any passes with his hands in the region of the stomach, he answered: “Simply massage.” The sessions lasted from a quarter of a minute to a minute. Actual bodily treatment was only had during these sessions, in the months of August and September, at which his housekeeper was present,

who held the hands of the patient. To the question of Expert Dr. Hirt, what Czynski meant by method of transference, a method which has been abandoned long since and which consisted in the application of magnets, for which, however, no medium was required, he showed a work of Prof. Luys of Paris, on that treatment, published in 1892, which proved that the method was still in vogue. He understood by transference the transference of disease from the body of the patient to the body of the hypnotized subject. To the charge of the President of the Court that he made the Baroness submit to his amatory offerings by annihilating through hypnotic influences her power of resistance, he replied: "A person as morally pure and as severely religious as the Baroness cannot possibly be deprived of her will power. In order to succeed in such a case the person would have to be subjected to a great many hypnotic operations, and a sickly person is not in a condition to concentrate her thoughts as sharply; this is an impossibility."

The examination of Baroness von Zedlitz takes place in the absence of the accused at her request. She is of tall build, features pleasant, but not handsome, and an expression of fatigue in her face. Her age she gives as 39. Protestant confession and the proprietress of the domain Inga. She had seen the doctor's advertisements in the Dreden papers, and she went there to consult him for her headache, and also to see a somnambule, which she was curious to see. When she came there the first time he was out, and a lady who happened to be there told her he was just then with the somnambule. This lady she recognized later as the medium. On the succeeding day she found Czynski at the somnambule's; she had to put her hand into hers while the latter was in hypnotic trance, and the somnambule then diagnosed her disease. The consultation proceeded in the following manner: "Czynski took one of my hands and the somnambule the other. She then told me various things which surprised me. She also told Czynski he should give me something to cure my pains; he knows what. The conversation was carried on in French. After that he woke the somnambule up, who rather disliked to be aroused. She then left the room. I asked him then if he considered it necessary for me to come back, and he thought it would be very desirable. Then I went there either the day following or a day thereafter. The somnambule was not there. Her name was Mrs. Hofman, née

Kœnig. He did not know my name then. On that day he told me different things from an examination of the palm of my hand and from a book, for instance, to what star I belonged. He then gave me a number of prescriptions, as I was on the point of travelling. The medicine was partly for external, partly for internal use. I believe he applied electricity to me then and placed his hand upon my head. I did not visit him further before my journey to Thuringen. I returned from my journey about the 2nd of September, and I had written to him during my absence abroad that his remedies had not benefited me any. After my return he visited me several times at my hotel, accompanied by his medium, where he treated me, which consisted of putting his hand upon my stomach and then upon my head, after I had opened my dress, so that his hand rested upon my shirt. He then passed his hands to and fro and spoke to me. I leaned back and closed my eyes. He told me to open my eyes and be cheerful, gay, laugh and eat well. The medium had been put to sleep already, and was seated next to me, holding my hand and touching my knee."

In answer to the question of Professor Preyer as to the time which those proceedings lasted, the witness answered: "About half an hour. I was always so sleepy. Czynski maintained that I was half asleep already. I laughed and insisted that it was not so. I never got asleep fully; it was only a doze. I remembered everything that occurred that day. After the treatment the medium took my hand and danced with me around the room. I asked her what she meant, and she said she was directed by him to do so. After the entire close of the proceedings the medium woke up and I also became fully aroused. I felt a pressure at the back of my head at various intervals, and visited Czynski again, and he resorted to the same treatment. He wanted to put me into a full sleep, but did not succeed. At one time I sent my maid to him to inform him that I could not come because I had the *migraine*. 'Oh, she will come!' he replied, and in reality I felt thereafter a little better, and at five o'clock in the afternoon, the time of the appointment, I went there. It was about this time that I gave him my name." After a great many details of the visits of the witness she related her further connections with him: "It was about the month of October that Czynski made a declaration of love to me during the treatment. I was frightened, surprised, and felt a profound

pity. He made the confession while I was in a condition of half sleep. He added that he was poor. Wieczinski, who I believed to be his wife, and of whom he spoke as his 'lady,' he told me was studying medicine. His wife, he told me further, was unfaithful to him, and he was very unhappy. I alone could save his soul and make him happy. He will apply for a divorce, turn Protestant and marry me. I cried, felt great sympathy for him, and believed that I would have to do a good work. But I cannot say that I felt any love for him. He overwhelmed me with letters, became distressingly persistent and continually dwelled upon his love for me during his treatment. His love found, however, no genuine response. But as something sad had occurred I asked myself whether I loved him, and whether I should help him to a better life. Then I said to myself, 'Yes, I have surrendered myself to him.' I do not know how that was possible. It was done so suddenly. All of this is so terrible, but I could not help it. Therefore I resolved to marry him, because I felt pity for him, and sought to discover a good kernel in him, and wanted to save his soul. I had never before had the idea of marrying him, and until his declaration of love I only evinced interest in his performances."

To other questions by the Court the witness said in substance: "He never ceased his impetuosity. I did not want to entertain his offers of meeting him, but I could not resist, and was compelled to meet him. We often discussed religious matters, and he then said I could save his soul. This gave me a sort of satisfaction, and I finally consented to accept his proposition. I no longer had any control over myself. I felt that I was entirely subject to his influence. The intimate intercourse with Czynski was not had during a condition of somnolence, only I was influenced to such a degree that I could not resist him. Though I was aware of the wrong I was doing, I was powerless to resist. Now that I have found out how Czynski has lied to me, I have a perfect aversion to him."

This extract from the testimony of the principal witnesses is probably sufficient to afford a clear view of the groundwork upon which the legal proceedings rested, but the opinions of eminent experts who rendered opinions are of paramount interest. Dr. Fuchs of Bonn said he could not enter upon special questions, but desired to give his opinion of hypnotism in general, as he was probably summoned for that purpose. His view in regard to

hypnotism was a total denial of its power. He does not consider it an instrument by which the human will could be controlled in a permanent or irresistible way. Nobody would succeed to induce one who simulates disease to relinquish simulation. Of course, witnessing the exhibitions of practitioners, the impression is made that their orders are implicitly obeyed. If a subject is told "You are not a human being, you are a dog," he runs on all fours, and barks, etc. All this is admitted. Experiments like these he had witnessed in Paris years ago, in great numbers, especially at the clinics of Professors Luys and Charcot. His conviction was that all the subjects practiced on were stupid people. They are under no other compulsion than the desire to make themselves interesting, or from some inducement to do the practitioner a favor. Of the great scientists, such as Charcot, for instance, no one would maintain that either of them could be placed into a hypnotic condition. Hypnosis will not succeed with any person who has the feeling of serious responsibility. He has the conviction that all the instances of hypnotism which he had seen were only a farce.

Expert Professor Dr. Grashey of Munich, in the introduction of his opinion, gave a definition of hypnotic influence and suggestion. "Suggestion," he says, "means to suggest to somebody a certain thought, to persuade him that a certain idea transferred is his own. Suggestions play a great role in the intellectual life of man, and especially in education. Children have no independent judgment and rapidly adopt the thoughts suggested to them by their parents, teachers and friends. But suggestive effect is due not merely to words, but also to example. A person can be suggested to go to sleep. Such a sleep, induced by suggestion, is called hypnosis, and the inducement of hypnosis is called hypnotism. The person who hypnotizes another is called hypnotizer. Hypnosis, or sleep induced by suggestion, has the peculiarity that the subject remains in mental rapport with the hypnotizer, who can suggest or transfer thoughts to the hypnotized person, and then the latter can offer less resistance than in a wakeful state.

"Hypnosis has also the peculiarity that it can be produced easier and easier as the operation is repeated. It is well known that through the means of impressed thoughts, persuasion and by given examples, the will of persons can be acted upon—can be influenced. Such an influence, however, does not mean an

interference with the freedom of will, because in a normal condition the whole stock of experience is on hand to be used in opposition and counter-reason against the proposition made. I am not one of those who, on account of the mechanical regularity with which the will expression of the man in normal health proceeds, are disposed to throw a doubt upon the existence of free will, and thereby question the application of the principle in criminal law which presupposes a free will, the free self-determination of man. According to my conception the grown man can be held devoid of his free will irresponsible then only when the action is exclusively or predominantly the product of abnormal or diseased factors, abnormal or diseased illusions, abnormal or diseased feelings, disposition and will impulses.

It must be ascertained, therefore, whether thoughts which are inspired during a light hypnotic condition affect or change as little the will power as the thoughts do which are suggested in a wake condition without preceding hypnosis.

In a light hypnosis the normal man does not dispose to an equal degree of his accumulation of experiences and of his ability of remonstrating as he does in a condition of full wakefulness. He receives the inspired thoughts more readily, he is more suggestible, he accepts many thoughts which he would have rejected in a wake condition, because he cannot dispose of remonstrative reasoning. I maintain, therefore, that the normal man disposes with less freedom of his will during a condition of light hypnosis. If, however, as it is generally assured, the suggestibility increases with every new production of hypnosis, the will power, as against the will of the hypnotizer, decreases by degrees, and the interference with the freedom of the subject's will increases as well as the restriction of the power of will. The subject frequently hypnotized remains also more suggestible in the intervening time, and it thus follows that thoughts may be suggested during his wake condition which he would have never accepted before the hypnotic operations had begun. The control of the subject's will may be undertaken, therefore, in a wake condition, and can be heightened by suggestions during the period of wakefulness; and thus we see a hypnotizer attain finally such power over his subject that a single word, a single look, may put him to sleep. At such a degree of suggestibility there can no longer be a question of a normal rise and leave of thoughts, of a normal procedure of the process of reasoning. The potentiality of putting

a man so promptly and so rapidly to sleep is not reconcilable with the assumption of free will power, and rather presupposes a condition of unfreedom of will.

Not only in regard to the time of going to sleep, of the beginning of hypnosis, is the person hypnotized dependent upon the hypnotizer, but also in regard to thoughts and feelings. A thought which is slightly opposed during the first condition of hypnosis in a less degree than in the normal condition will meet with less opposition as the hypnotizing progress is continued; sentiments and dispositions which were but slightly indicated during the first operation will grow, become stronger and more intense as the process is repeated.

Again, a hypnotizer who has gained a certain power over an individual by a repetition of hypnotic procedures can suggest successfully a thought or a sentiment which in the commencement would hardly have been received, and thus the hypnotized individual falls into a condition of subserviency in ideas and sentiments at the cost of his own freedom of will.

What, then, is a condition of "loss of will" in the sense of the law?

"Loss of will" is as much as total absence of will power; because consciousness means absence of consciousness, irrational means absence of reason.

As a child under the age of twelve years in the sense of the law is considered to be without the power of free will, and therefore legally irresponsible, therefore every child under the age of twelve years has in the sense of the law will; therefore, when we speak of a condition "without will power" we do not mean a condition which excludes all assertion of will and every expression of will, but merely a condition in which on the whole, or in a special relation, the determination of the will is excluded.

GENERAL NOTES.

AN AGED SOLICITOR.—Mr. Francis Raynes, who died at Bawtry, near Doncaster, on the 21st November, after a brief illness, was probably the oldest solicitor in England. He was in his ninety-seventh year, having been born in April, 1800. At Doncaster Market, at which, despite his great age, he was a regular attendant, he caught a cold. Congestion of the lungs speedily set in, and seven days later he died. He started in

practice seventy-four years ago, having been admitted a solicitor in 1822. He retired from practice several years ago, but a few of his former clients continued to employ him in matters which did not impose too severe a strain upon his strength. His family was a singularly long-lived one. His brother, who for many years practised as a doctor in the Isle of Man, died not long ago at Bawtry at the age of ninety-three. Mr. Raynes was, even when far advanced in years, an enthusiastic follower of Lord Galway's hounds. When he was no longer able to join in the chase he habitually attended the meet in a phaeton. He was present at the opening meet at the beginning of last month.

PRIVILEGES OF THE POLICE.—The cases of the Michaelmas sittings afford consolation to the much abused police. We select two rulings for their comfort: (1) The joint committee of a county council is not justified, even by the advice of the Home Office, in insisting on the exercise of its power to have a pensioned constable medically examined in the county, with the ulterior object of bringing him within reach of an official receiver in bankruptcy—*Regina v. Lord Leigh*. (2) A constable is acting in the execution of his duty who pursues a coroner to his lawn-tennis club to inform him of the discovery of a dead body within his district, and stops him in his amusement to give him the information. But *semble* that before interfering with a coroner in the execution of his pleasures, the constable should first seek him at his official residence, and failing to find him there, should seek his clerk or officer.—*Cook v. Gaches* (Queen's Bench Division on November 2)—*Law Journal*.

PRIVILEGE OF WITNESSES IN ENGLAND.—We forbear at present to comment on the case of *Kitson v. Playfair* further than to express our agreement with the observations of Sir Henry Hawkins in regard to the lack of any authority in Courts of law for the code of professional rules as to confidentiality which medical men have constructed for themselves. The issue could hardly have been raised in the case of a barrister, who—unlike a medical man (*Duchess of Kingston's Case*, 20 St. T. 572, 573) and *semble* a priest of the Church (*Butler v. Moore*, M'Nalty Evid. 253, 254)—is usually not only not compellable, but not permitted to disclose confidential communications. The position of priests is still doubtful, as we have indicated, but only in regard to the question of compulsion. Chief Justice Best, in *Broad v. Pitt*, 3

C. & P. 518, and Baron Alderson, in *Regina v. Griffin*, 6 Cox C. C. 219, favoured their exemption. But no judge has ever said that if a priest offered to disclose communications made to him by a prisoner he would decline to receive them in evidence.—*Ib.*

SECRET COMMISSIONS.—It is primarily to the Lord Chief Justice of England and to Sir Edward Fry that the credit of setting an effective agitation on the subject in motion belongs. There have from time immemorial been cases in which the receivers of secret commissions have been compelled to disgorge them, and nothing could be better, in point of moral indignation, than the scathing comments with which successive English judges accompanied these decrees for restitution. But such denunciations were too often restricted to the particular facts with which the Courts had to deal, and were never carried into the region of general action. Lord Russell's declaration in the *Oetzmann Case* that he would do his best in future to make the recovery of secret commissions impossible constituted a new and most salutary judicial departure; and Sir Edward Fry, who, though unfortunately he can no longer wield the thunderbolts of the Bench, still speaks with the authority of one of the most distinguished of English lawyers and judges, has strongly and successfully reinforced the Lord Chief Justice's action, both by demonstrating against a host of correspondents the urgent need for an awakening of the national conscience on the subject, and by indicating a variety of practical methods to prevent the healthy public sentiment which has been aroused aimlessly evaporating. It is unnecessary to dwell further upon the points in the controversy of which Sir Edward Fry has borne the brunt. The only argument urged against him which deserves even a passing notice was that of a correspondent who cited the cases of a banker who gets a return commission on the purchase of stock, and a solicitor receiving a commission for effecting a fire insurance for a client. The obvious answer to these alleged analogies is that it is the secrecy which makes the difference between commissions that are and those that are not illicit. The point of present importance now, however, is not the existence of the disease in the body mercantile, but the means by which it is to be cured, and it is here that Sir Edward Fry's suggestions are peculiarly valuable.—*British Review.*

APPOINTMENT.—The Minister of Justice of the Dominion of Canada has appointed Mr. Charles Russell, of the firm of Messrs. Day, Russell & Co., to be solicitor in the United Kingdom for the Government of the Dominion of Canada.

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CURRENT TOPICS AND CASES.

The Court of Appeal, at Quebec (Nov. 13), in *Tapp & Turner*, had occasion to interpret Art. 1102 of the Code of Procedure, as to which there have been conflicting decisions in the lower courts. Art. 1102 says: "Judgments for sums not exceeding forty dollars can only be executed upon the movable property of the debtor, except," etc. The question did not arise upon the exceptions. The point was whether the words "judgments for sums not exceeding forty dollars" mean judgments where the debt and costs together do not exceed forty dollars. The literal construction of the words of the article might appear, at first sight, to exclude the question of costs, and so the courts at Montreal have held in several cases. See *Jencks Machine Co. v. Hood*, 21 R.L. 204, where several decisions are referred to. On the other hand, the Quebec courts appear to have held usually that the award of costs being part of the judgment, execution may issue against real property where the debt and costs exceed forty dollars. The Court of Appeal has sustained the latter view, Justices Blanchet and Wurtele dissenting. If the costs, which are awarded by distraction to the

attorney, may be included, of course interest may also be taken into the calculation. So, too, where the action is dismissed with costs which exceed forty dollars, execution may issue at the instance of the defendant against immovables of the plaintiff for such costs.

Ex-president Harrison, in answer to a request from a correspondent as to the possibility of succeeding in the legal profession without following a course at a law school, writes as follows: "Whatever success I have attained at the bar was attained without a course at a law school. I studied law in the office of a leading firm in Cincinnati. That a course of lectures by able professors upon the law, as upon any other subject, is valuable to the student, I do not doubt. But these professors derive their information from books, to which the student has access, and he may grub knowledge for himself if he has the requisite pluck and industry. The observation and casual instruction which a student gets in a law office are of the first value to a practitioner." The experience of Mr. Harrison is no doubt similar to that of thousands of other practitioners, who never had an opportunity of attending a course of law lectures; but he cannot be quoted as adverse to such instruction. He says it is not indispensable where the student has sufficient industry and determination, and this proposition cannot be questioned.

The appeal list for the January term at Montreal contained precisely the same number of cases as that for November—29. Nineteen were appeals from the Montreal district and ten from outside districts. Fifteen cases on the printed list and one case of later date were heard, the other fourteen being continued. The Court has intimated that after the list has been called twice, and all the cases in which the parties are ready to proceed

have been heard, the term will be closed. Under this rule, the Court will decline to fix cases for particular days, when the parties are not ready at the time the cases are called. Such cases go to the foot of the list.

The Supreme Court of Ohio is one of the courts which has great difficulty in keeping pace with the increase of business. Its record last year was a remarkable one, 704 cases having been disposed of, compared with 504 in the previous year. The year, however, closed with 864 cases still undisposed of, as against 978 one year ago.

NEW PUBLICATION.

BLACKSTONE'S COMMENTARIES.—By Wm. Draper Lewis, Ph. D., Dean of the Faculty of the Law Department of the University of Pennsylvania. Rees Welsh & Co., Philadelphia, Publishers, Vol. 1.

This edition of Sir William Blackstone's well-known work has some remarkable features. It is unabridged. Each word, phrase or sentence found in the text of Blackstone, or in the notes, printed in Greek, Latin, Norman French, Italian, etc., as well as maxims and quotations, has been translated into English, and added in the notes upon the particular page where the quotations appear. Then, again, all text-book writers in the United States and England, who have referred to Blackstone in their works, are cited in the foot notes. It is also stated that lawyers will find, in every reported case in the United States, England and Canada, where the judge in rendering his opinion, has quoted Blackstone, the name of the case, date, volume and page are given. From what has been said it will be seen that a vast amount of labor has been expended by the editor in the preparation of the edition, of which Vol. 1 has now been issued. It is in fact a treasure house of learning, as to all that concerns the work of the great English commentator. The notes of former editors have been used, credit being given; but the present editor's own labors have added immensely to the interest and value of the work. We have pleasure in commending so important a publication to the attention of our readers.

QUEEN'S BENCH DIVISION.

LONDON, 25 January, 1897.

In re CHAFFERS. Ex parte THE ATTORNEY-GENERAL. (32 L.J.)
Habitual and persistent institution of vexatious legal proceedings.

This was an application by the Attorney-General for an order under the Vexatious Actions Act, 1896, prohibiting the respondent, Alexander Chaffers, from instituting any legal proceedings without leave of the High Court or of some judge of the High Court, on the ground that the respondent had habitually and persistently instituted vexatious legal proceedings within the terms of section 1 of that Act. The facts were set out in two affidavits, in which it was shown that the respondent between January, 1891, and December, 1896, had instituted forty-eight actions against the Lord Chancellor and other judges, the Speaker, officials of the House of Commons, the Solicitors for the Treasury, and the trustees of the British Museum. The actions were mainly brought for slander, conspiracy to defeat justice, assault, refusal to receive a petition to the House of Commons, and wrongful exclusion from the reading-room of the British Museum. The respondent had failed in forty seven actions, and no costs had been obtained for him. In one action he succeeded on a claim for 1*l.* for work done in copying an affidavit for the use of the Solicitor to the Treasury. Another action against a judge was still pending.

The Attorney-General (Sir R. E. Webster, Q.C.) and H. Sutton supported the motion.

Corrie Grant (assigned by the Court) appeared for the respondent.

The COURT (WRIGHT, J., and BRUCE, J.) held that the Vexatious Actions Act, 1896, though not retrospective in so far as it did not operate upon any past proceedings, clearly applied to a case such as the respondent's, and was plainly intended to prevent similar proceedings in future; and that, looking at the number of the actions, their general character and their results, there was good ground for holding that the respondent had habitually and persistently instituted vexatious legal proceedings.

Order prohibiting the respondent from instituting any legal proceedings either in the High Court or any other Court without leave of the High Court or of a judge thereof.

NEW YORK COURT OF APPEALS.

8th December, 1896.

HARRY C. ADAMS, respondent, v. THE NEW JERSEY STEAMBOAT COMPANY, appellant.

Passenger's money stolen from stateroom of steamboat—Liability of steamboat company similar to that of innkeeper.

A steamboat company is liable to a passenger for loss, without negligence on his part, of a sum of money reasonable and proper for him to carry upon his person to defray the expenses of his journey, stolen from his stateroom during the passage; and without any proof of negligence on the part of the company.

The liability of the company, in such a case, as an insurer of the property of its passengers, is similar to that which exists on the part of an innkeeper towards his guests.

Appeal from a judgment of the General Term, First Department, affirming a judgment in favor of the plaintiff.

O'BRIEN, J.—On the night of the 17th of June, 1889, the plaintiff was a cabin passenger from New York to Albany on the defendant's steamer Drew, and for the usual and regular charge was assigned to a stateroom on the boat. The plaintiff's ultimate destination was St. Paul, in the State of Minnesota, and he had upon his person the sum of \$160 in money for the purpose of defraying his expenses of the journey. The plaintiff on retiring for the night, left this money in his clothing in the stateroom, having locked the door and fastened the windows. During the night it was stolen by some person who apparently reached it through the window of the room.

The plaintiff's relations to the defendant as a passenger, the loss without negligence on his part, and the other fact that the sum lost was reasonable and proper for him to carry upon his person to defray the expenses of the journey, have all been found by the verdict of the jury in favor of the plaintiff. The appeal presents, therefore, but a single question, and that is, whether the defendant is in law liable for this loss without any proof of negligence on its part. The learned trial judge instructed the jury that it was, and the jury, after passing upon the other questions of fact in the case, rendered a verdict in favor of the plaintiff for the amount of money so stolen. The judgment entered upon the

verdict was affirmed at general term, and that court has allowed an appeal to this court.

The defendant has therefore been held liable as an insurer against the loss which one of its passengers sustained under the circumstances stated. The principle upon which innkeepers are charged by the common law as insurers of the money or personal effects of their guests originated in public policy. It was deemed to be a sound and necessary rule that this class of persons should be subjected to a high degree of responsibility in cases where an extraordinary confidence is, necessarily, reposed in them, and where great temptation to fraud and danger of plunder exists by reason of the peculiar relations of the parties: Story on Bailments, Sec. 464; 2 Kent's Com. 592; *Hulett v. Swift*, 33 N. Y. 571. The relations that exist between a steamboat company and its passengers, who have procured staterooms for their comfort during the journey, differ in no essential respect from those that exist between the innkeeper and his guests.

The passenger procures and pays for his room for the same reasons that a guest at an inn does. There are the same opportunities for fraud and plunder on the part of the carrier that was originally supposed to furnish a temptation to the landlord to violate his duty to the guest.

A steamer carrying passengers upon the water, and furnishing them with rooms and entertainment is, for all practical purposes, a floating inn, and hence the duties which the proprietors owe to the passengers in their charge ought to be the same. No good reason is apparent for relaxing the rigid rule of the common law which applies as between innkeeper and guest, since the same considerations of public policy apply to both relations.

The defendant, as a common carrier, would have been liable for the personal baggage of the plaintiff unless the loss was caused by the act of God or the public enemies, and a reasonable sum of money for the payment of his expenses, if carried by the passenger in his trunk, would be included in the liability for loss of baggage: *Merrill v. Grinnell*, 30 N. Y. 594; *Merritt v. Earl*, 29 N. Y. 115; *Elliott v. Russell*, 10 Wend. 7, Brown on Carriers, Sec. 41; Redfield on Carriers, Sec. 24; Angell on Carriers, Sec. 80.

Since all questions of negligence on the part of the plaintiff, as well as those growing out of the claim that some notice was posted in the room regarding the carrier's liability for the money, have

been disposed of by the verdict, it is difficult to give any good reason why the measure of liability should be less for the loss of the money under the circumstances than for the loss of what might be strictly called baggage.

The question involved in this case was very fully and ably discussed in the case of *Crozier v. Boston, N. Y. & Newport Steamboat Company*, 43 How. Pr. 466, and in *Macklin v. New Jersey Steamboat Company*, 7 Abb. Pr. 229. The liability of the carrier in such cases as an insurer seems to have been very clearly demonstrated in the opinion of the court in both actions upon reason, public policy and judicial authority. It appears from a copy of the remittitur attached to the brief of plaintiff's counsel that the judgment in the latter case was affirmed in this court, though it seems that the case was not reported.

It was held in *Carpenter v. N. Y., N. H. & H. R. R.R. Co.*, 124 N. Y. 53, that a railroad running sleeping coaches on its road was not liable for the loss of money taken from a passenger while in his berth, during the night without some proof of negligence on its part. That case does not, we think, control the question now under consideration. Sleeping car companies are neither innkeepers nor carriers. A berth in a sleeping car is a convenience of modern origin, and the rules of the common law in regard to carriers or innkeepers have not been extended to this new relation.

This class of conveyances are attached to the regular trains upon railroads for the purpose of furnishing extra accommodations, not to the public at large nor to all the passengers, but to that limited number who wish to pay for them. The contract for transportation and liability for loss of baggage is with the railroad, and real carrier. All the relations of passenger and carrier are established by the contract implied in the purchase of the regular railroad ticket, and the sleeping car is but an adjunct to it only for such of the passengers as wish to pay an additional charge for the comfort and luxury of a special apartment in a special car. The relations of the carrier to a passenger occupying one of these berths are quite different with respect to his personal effects from those which exist at common law between the innkeeper and his guest, or a steamboat company that has taken entire charge of the traveller by assigning to him a stateroom.

While the company running sleeping cars is held to a high

degree of care in such cases, it is not liable for a loss of this character without some proof of negligence. The liability as insurers which the common law imposed upon carriers and innkeepers has not been extended to these modern appliances for personal comfort, for reasons that are stated quite fully in the adjudged cases and that do not apply in the case at bar: *Ulrich v. N. Y. C. & H. R. RR. Co.*, 108 N. Y. 80; *Pullman Co. v. Smith*, 73 Ill. 360; *Woodruff Co. v. Diehl*, 84 Md. 474; *Lewis v. R. R. Co.*, 143 Mass. 267.

But aside from authority, it is quite obvious that the passenger has no right to expect, and in fact does not expect, the same degree of security from thieves while in an open berth in a car on a railroad as in a stateroom of a steamboat, securely locked and otherwise guarded from intrusion. In the latter case, when he retires for the night, he ought to be able to rely upon the company for his protection with the same faith that the guest can rely upon the protection of the innkeeper, since the two relations are quite analogous. In the former the contract and the relations of the parties differ at least to such an extent as to justify some modification of the common law rule of responsibility.

The use of sleeping cars by passengers in modern times created relations between the parties to the contract that were unknown to the common law, and to which the rule of absolute responsibility could not be applied without great injustice in many cases. But in the case at bar no good reason is perceived for relaxing the ancient rule and none can be deduced from the authorities. The relations that exist between the carrier and the passenger who secures a berth in a sleeping car or in a drawing-room car upon a railroad are exceptional and peculiar. The contract which gives the passenger the right to occupy a berth or a seat does not alone secure to him the right of transportation. It simply gives him the right to enjoy special accommodations at a specified place in the train.

The carrier by railroad does not undertake to insure the personal effects of the passenger which are carried upon his person against depredation by thieves. It is bound, no doubt, to use due care to protect the passenger in this respect, and it might well be held to a higher degree of care when it assigns sleeping berths to passengers for an extra compensation than in cases where they remain in the ordinary coaches in a condition to pro-

tect themselves. But it is only upon the ground of negligence that the railroad company can be held liable to the passenger for money stolen from his person during the journey. The ground of the responsibility is the same as to all the passengers, whether they use sleeping berths or not, though the degree of care required may be different.

Some proof must be given that the carrier failed to perform the duty of protection to the passenger that is implied in the contract before the question of responsibility can arise, whether the passenger be in one of the sleeping berths or in a seat in the ordinary car. The principle upon which the responsibility rests is the same in either case, though the degree of care to which the carrier is held may be different. That must be measured by the danger to which the passenger is exposed from thieves and with reference to all the circumstances of the case. The carrier of passengers by railroad, whether the passenger be assigned to the ordinary coaches or to a berth in a special car, has never been held to that high degree of responsibility that governs the relations of innkeeper and guest, and it would perhaps be unjust to so extend the liability when the nature and character of the duties which it assumes are considered.

But the traveller who pays for his passage, and engages a room in one of the modern floating palaces that cross the sea or navigate the interior waters of the country, establishes legal relations with the carrier that cannot well be distinguished from those that exist between the hotel keeper and his guests. The carrier in that case undertakes to provide for all his wants, including a private room for his exclusive use, which is to be as free from all intrusion as that assigned to the guest at a hotel. The two relations, if not identical, bear such close analogy to each other that the same rule of responsibility should govern.

We are of the opinion, therefore, that the defendant was properly held liable in this case for the money stolen from the plaintiff, without any proof of negligence.

The judgment should be affirmed.

All concur.

WHAT CONSTITUTES A VALID MARRIAGE?

In a case recently decided by the Supreme Court of Minnesota—*In re estate of N. Hulett*, Mitchell, J., expressed himself as follows as to what constitutes a valid marriage:—

The respondent had been for a long time prior to the execution of the marriage contract in the employment of Hulett as housekeeper, at his farm at Stoney Point, some miles out of the city of Duluth. Her testimony is that immediately after the execution of this contract she moved into his room, and that from henceforth until his death they occupied the same sleeping apartment, and cohabited together as husband and wife. But she admits that it was agreed between them that their marriage was to be kept secret until they could move into Duluth and go to housekeeping, in a house which Hulett owned in that city. While a feeble effort was made to prove that their marital relation had become known to one or two persons, yet we consider the evidence conclusive that their marriage contract was kept secret; that they never publicly assumed marital relations or held themselves out to the public as husband and wife, but, on the contrary, conducted themselves so as to leave the public under the impression that their former relations of employer and housekeeper remained unchanged. Upon this state of facts the contention of the appellants is that there was no marriage, notwithstanding the execution by them of the written contract; that in order to constitute a valid common-law marriage the contract, although *in verba de presenti*, must be followed by habit or reputation of marriage, that is, as we understand counsel, by the public assumption of marital relations.

We do not so understand the law. The law views marriage as being merely a civil contract, not differing from any other contract, except that it is not revocable or dissoluble at the will of the parties. The essence of the contract of marriage is the consent of the parties, as in the case of any other contract, and whenever there is a present perfect consent to be husband and wife the contract of marriage is completed. The authorities are practically unanimous to this effect. Marriage is a civil contract *jure gentium* to the validity of which the consent of parties able to contract is all that is required by natural or public law. If the contract is made *per verba de presenti* and remains without cohabitation, or if made *per verba de futuro* and be followed by

consummation, it amounts to a valid marriage in the absence of any civil regulations to the contrary. (2 Kent Com. p. 87; 2 Greenl. Ev. sec. 460; 1 Bishop, Mar. & Div. secs. 218, 227, 228, 229). The maxim of the civil law was "*consensus non concubitus facit matrimonium.*"

The whole law on the subject is that to render competent parties husband and wife they must, and need only, agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status. If cohabitation follows it adds nothing in law, although it may be evidence of marriage. It is mutual present consent lawfully expressed which makes the marriage. (1 Bish. Mar. Div. & Sep. secs. 239, 313, 315, 317.)

See, also, the leading case of *Dalrymple v. Dalrymple* (2 Hazard Rep. 54), which is the foundation of much of the law on the subject. An agreement to keep the marriage secret does not invalidate it, although the fact of secrecy might be evidence that no marriage ever took place. (*Dalrymple v. Dalrymple, supra.*)

The only two cases which we have found in which anything to the contrary was actually decided, are: *Regina v. Millis*, 10 Cl. & F. 534, and *Jewell v. Jewell*, 1 Hun (U.S.) 219, the court in each case being equally divided. But these cases have never been recognized as the law, either in England or in this country.

KLEPTOMANIA.

In a paper read at the Congress of Criminal Anthropology by Prof. Lacassagne, corresponding member of the Medico Legal Society, and editor of the Journal of Criminal Anthropology, of Lyons, France, the writer divides the women thieves called kleptomaniacs into three categories. The 'collectionneuses,' who steal without need, merely for the pleasure of possessing, are the first. Then come the 'deséquilibrées,' whose minds have not a perfect poise. The greater part of these are rich women. Many of them, after yielding to the first few impulses to steal, become decided thieves and utterly incapable of resisting temptation.

He mentioned one such woman as having purchased goods to the amount of 200 francs in a Paris shop. Passing out of the store she stole a sponge valued at twelve sous. On another occasion the same woman made some large purchases, and then stole a fifteen cent pocketbook to give to her cook.

The third category of these women thieves comprises those who are really mentally diseased, and who steal without having the slightest idea of what they are doing.

For all these women thieves Dr. Lacassagne invokes the indulgence of the courts. But he is of the opinion that it would be better to prevent than to punish. In the resolution which he presented for the consideration of the congress he said: 'The great stores are veritable provokers of special thefts. They constitute a real danger for feeble or sickly persons. A great many women who would not steal elsewhere here find themselves fascinated and overwhelmed with a desire to appropriate small articles within their reach. It is a temptation that is truly diabolic, for the chances of detection are minimized at certain hours during the day when the stores are crowded, and each clerk has many customers waiting to be served, these meanwhile handling the goods that lie upon the counters.

The best method of preventing these women from becoming thieves would be, he says, to station at each counter an officer of the law, not in ordinary dress like the rest of the customers, but in a uniform as conspicuous and noticeable as possible. If a gendarme was placed at each counter there would be no more thefts. Women steal in these places because they believe that they can do so without being detected.

Dr. Lacassagne also indorsed the rule of some stores that no known kleptomaniacs should be admitted, and suggested that it would be an excellent provision if this rule should be made general, and if minors, unaccompanied, should also be excluded.

"The kleptomaniacs," he said, "steal only in the great stores, in which places the surroundings are all provocative of theft. The articles of merchandise are so arranged as to excite the covetousness of the visitor, for the customer, merchants know well, must be fascinated and her desires excited by the lavish display of rich goods.

"These excitants of the senses might be called the *aperitifs* of crime, for as absinthe or vermouth stimulates the appetite for food, so do heaped-up counters whet the feminine greed for possession. The strongest willed of women will yield by expending more than she in her sober moments has set aside for her wants. But who can measure the force which draws on and overmasters the feebler or degenerate minds?

"In London the police and the great stores have a list of people known to be kleptomaniacs—all of whom are people of wealth—about eight or ten hundred in number. When a merchant finds that he has lost something by theft, he ascertains the names of those of his kleptomaniac clients who have visited his place within the previous day or so, and to each of these he sends a circular requesting that they forward to him at once the missing article in question or the price. The kleptomaniac does not remember whether she has stolen or not; she pays at once, therefore, to ease her awakened conscience. It so happens, therefore, that for the same theft as many as ten families will indemnify one of these great stores."

In the discussion that followed Prof. Lacassagne's paper, Motet, the distinguished French alienist, said:

"It is possible for us to draw the line between the kleptomaniac and the shoplifter, if we know the value of the object stolen. The professional thieves scorn all articles save those of some value, but the true kleptomaniac picks up things of trifling cost in comparison. When detected they say with undoubted sincerity, 'It seemed to me as if everything belonged to me—I might have taken all.'

"These thieves are the mentally unbalanced, whose minds are slightly touched by disease. Here the intervention of medicine is legitimate. We have asked many times for a law compelling the appointment of inspectors in the great stores, whose business it shall be to deter by their presence all attempts or even thoughts of theft on the part of these kleptomaniacs."

The following resolution was finally adopted by the congress: "The Congress of Criminal Anthropology, considering that theft in the great stores and grand bazaars is a new crime of a particular character, *sui generis*, resulting from a combination of circumstances artificially constituted, among which may be cited the means employed to tempt the public, the facilities which are given to hold for a length of time in the hands the articles put on sale, and, above all, the absence of an efficacious protection or surveillance, make the following recommendation: That the great magasins and houses of commerce in which the public is permitted to circulate freely, should be the subject of special police regulation, with a view of diminishing the possibility of the commission of these thefts."

ESTOPPEL BY TAKING A BENEFIT.

If there is one point more clearly settled than another on the thorny subject of estoppels, it is that the judgment of a Court of record is conclusive between the same parties. The rule is thus laid down in the *Duchess of Kingston's Case*; and in Buller's 'Nisi Prius' the reason is stated to be that 'the verdict ought to be between the same parties, because otherwise a man might be bound by a decision who had not the liberty to cross-examine.' If authority on the point be sought in the domain of legal maxim, it is found in the saying 'Res inter alios acta alteri nocere non debet.' But sometimes a man may be estopped, not indeed by a judgment to which he was not a party, but by his conduct when and after the judgment came to his knowledge. A good instance of this is found in the recent case of *In re Lart; Wilkinson v. Blades*, 65 Law J. Rep. Chanc. 846, in which a man who was not bound by a judgment delivered in a former action to which he had not been made a party, but who had been aware of the judgment at the time when it was delivered and had received and retained a fund which it put into his pocket, was estopped, when identical circumstances subsequently arose, from reopening any of the questions which that judgment covered by taking proceedings relating to another fund arising under the same will; even though the new claim was made in respect of a different interest. The nearest analogy which could be found was in the practice of the Probate Division, in which when a will is disputed, and an interested party does not intervene, he is bound by the proceedings although he was not a party to them. To quote Lord Penzance's language in *Wytcherley v. Andrews*, such a party cannot complain if, knowing what was passing, he has been content to stand by and see his battle fought by somebody else in the same interest. And since *Wytcherley v. Andrews* was decided provision has been made by Rules of Court for enabling those who have an interest in an action to be added as parties. From his knowledge of the facts, and more especially from the circumstance that he took the money, the plaintiff in *In re Lart* seems to have been really, though not technically, 'privy' to the judgment which he afterwards complained of. The case is a curious one from the apparent absence of direct authority on the point.—*Law Journal*.

"SURPLUS ASSETS."

Phrases often get currency without being understood, legal phrases especially, and 'surplus assets' is one of them. The reason is the invincible indolence of the human mind, which will not undergo the fatigue of analysing or testing the truth of language unless there is something at stake which makes it worth while to do so. The stake in the *New Transvaal Company* did make it worth while. On one construction of 'surplus assets' the holders of the founders' shares in the company stood to win 18,000*l.* on the 200 shares, for which they had paid 1*l.* each. On the other construction, they would get some 18*s.* 6*d.* per share. The question on which this large cash difference turned was whether the property of the company remaining after payment of outside debts and liabilities only was distributable as 'surplus assets,' or whether the paid-up capital also must be returned before a surplus was arrived at. To some extent it was a question of the company's articles, but at bottom it was one of principle. If a company's paid-up capital is a debt due from the company to its shareholders, then it must be paid—of course, after outside creditors have been first satisfied—like any other debt of the company, and till it is so paid there can be no surplus. This seems the true view, and a sound view. A trading company is a corporate person, to whom the shareholders lend their money, that it may be employed for the acquisition of gain on the objects stated in the company's memorandum. The shareholders set the company up in business and then get paid a rate of interest varying with the profits. This is not only the theory of the thing, but the practical outcome. Shareholders are investors and dividend-drawers, not in any true sense parties managing a business.—*Ib.*

GENERAL NOTES.

FORM OF OATH.—The West Riding magistrates in the Leeds division have decided to accept the Scottish form of oath. In announcing the decision of the magistrates the chairman, Mr. Benson Jowett, said it had been pointed out in some recent letters and articles in the *Times* that in no country in Europe

except England was the superstitious form of kissing the book observed. He took occasion to express his own opinion that it was a somewhat uncleanly thing to kiss a book not always over-clean by lips which sometimes merited the same description. It certainly was not sanitary to perform an act which might transmit, and in many cases had transmitted, dangerous infections and even loathsome diseases. There was much more impressiveness too, about the Scottish form of oath. On behalf of the constabulary the decision to adopt the Scottish form was also announced.

QUALIFIED PRIVILEGE.—Mr. Blake Odgers, Q.C., in his fifth lecture on The Law of Libel, under the new scheme of the Council of Legal Education, delivered at the Middle Temple Hall, dealt with "Qualified Privilege." Every fair and accurate report of any proceeding in a Court of law was privileged, unless the Court has itself prohibited the publication, or the subject matter of the trial was unfit for publication. That was so even where an application was made to the Court *ex parte*. All comment must be reserved till the trial was over. Similarly, a fair and accurate report of any proceeding in either House of Parliament was privileged, although it contained matter defamatory of an individual. At one time, only proceedings of a public meeting were privileged at common law. The lecturer referred to the decision of the Court of Appeal in *Purcell v. Sowler*, and the Newspaper Libel and Registration Act. The Law of Libel Amendment Act, 1888, defined "public meeting" to mean any meeting *bonâ fide* and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted. The next question discussed was malice. Dr. Blake Odgers said that, as soon as the judge ruled that the occasion was privileged, the plaintiff had to prove malice. Malice did not mean malice in law, a term in pleading, but actual malice, a wrong feeling in a man's mind. It might be proved by extrinsic evidence, showing that there were former disputes or ill-feeling between the parties, or other libels or slanders published by the defendant or the plaintiff. Or it might be proved by intrinsic evidence, such as the unwarranted violence of defendant's language, or the unnecessary extent given to the publication.

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SUPREME COURT OF CANADA.

OTTAWA, 25 January, 1897.

SALVAS v. VASSAL.

Quebec.]

Title to land—Sale absolute in form—Right of redemption—Effect as to third parties—Pledge.

Real estate was conveyed to S. by notarial deed, absolute in form but containing a provision that the vendor should have the right to a re-conveyance on paying to S. the amount of the purchase money within a certain time. S. subsequently advanced the vendor a further amount and extended the time for redemption. The vendor did not pay the amount within the time and the property having been seized under execution issued by V., a judgment creditor of the vendor, S. filed an opposition claiming it under the deed.

Held, reversing the judgment of the Court of Queen's Bench Q.R., 5 Q.B. 349, that the sale to S. was a *vente à réméré* and was not when the rights of third parties were in question, to be treated as a pledge and set aside on proof that the vendor was insolvent when it was executed. *Pacaud v. Huston*, (3 Q.L.R. 214) overruled.

Appeal dismissed with costs.

Geoffrion, Q.C., and *Lavergne*, for appellant.

Crépeau, Q.C., and *Beaudin, Q.C.*, for respondent.

25 January, 1897.

MURPHY V. LABBÉ.

QUEBEC.]

Lessor and lessee—Use of premises—Destruction by fire—Negligence—Burden of proof—Art. 1629 C.C.

Premises were leased to be used as a furniture factory, the lease containing the usual covenants as to repair. The premises were destroyed by fire of which it proved impossible to discover the origin. In one of the rooms there was a quantity of cotton waste saturated with oil, but nothing to connect it with the fire. In an action by the lessor for the restoration of the premises or equivalent damages,

Held, affirming the judgment of the Court of Queen's Bench, P.Q., Q.R., 5 Q.B. 88, Strong, C.J., dissenting, that there was no obligation on the lessee, by virtue of art. 1629 C.C., to excuse himself from liability by proving that the fire occurred from causes beyond his control; that negligence must be established against him as in other cases of the kind; that he is not liable if he proves that he has used the premises in the manner a prudent owner would use them; and that the presence of the saturated cotton waste was, of itself, no evidence of negligence.

Held, also, that the evidence of workmen of the lessee should not be discredited because they might possibly have feared convicting themselves of imprudent acts.

Appeal dismissed with costs.

Béique, Q.C., and *Trenholme, Q.C.*, for appellant.

Laflour and Fortin, for respondent.

25 January, 1897.

CITY OF QUEBEC V. NORTH SHORE RY. CO.

QUEBEC.]

Construction of deed—Ambiguous expressions—Conduct of parties—Presumptions.

On the 21st of August, 1882, the Government of Quebec acquired by deed from the City of Quebec all the proprietary rights that the city had in lands designated on the cadastre as

No. 1937 "situated between St. Paul, St. Roch and Henderson streets and the river St Charles, with the wharves and buildings thereon erected," concerning which there had previously been negotiations and some correspondence between the Government and the City, but the deed however did not follow precisely the designations or terms referred to in the correspondence. On the same day, by another deed, the Government conveyed the same property to the respondent, and subsequently the property passed to the Canadian Pacific Railway under the provisions of 47 V. (D.) ch. 87, s. 3 and 48 and 49 V. (D.) ch. 58, s. 3. Upon the execution of the deeds mentioned the respondent took possession of the grounds and wharves which have been occupied firstly by the respondent and then by the Canadian Pacific Railway ever since that time. In August, 1894, the respondent brought an action to recover part of the lands alleged by them to have been included in the description contained in the deed, which had not been delivered to them, but had remained in the possession and occupation of the city and others to whom the city had sold the same. The difficulty arose from the ambiguity in the description arising from the fact that "Henderson" street did not run to the river but only to a public highway known as "Orleans Place," the limits of which were not in direct prolongation of Henderson street as actually used for a thoroughfare. The respondent claimed that from the correspondence pending the negotiations it appeared that the intention of the parties to the deed was that the boundary should be by Henderson street, and the line of the western limit of that street as then in use prolonged into the river St. Charles, which would entitle them to an additional strip of land and a wharf commonly called the "Gas Wharf," of which they had been improperly deprived during a period of over twelve years through unlawful occupation by the city and those to whom the city sold the property after having conveyed it to the Government by that description.

Held, that in the absence of other means of ascertaining the intention of the parties, ambiguities in the designation of lands should be interpreted against the vendee and in favour of the vendor and his assigns.

In cases of ambiguous descriptions in deeds of lands the manner in which the parties to the deed have occupied and dealt with property which might be affected thereby is strong proof of the boundaries of the lands intended to be conveyed, and sufficient in

law to justify the presumption that the parties by their subsequent occupations correctly executed their intentions at the time of the passing of the deed.

Held, per Gwynne, J., that whatever, if any, right, title or interest, in the disputed portion of the lands did pass by the first deed to the Quebec Government, had become vested in the Canadian Pacific Railway Company in virtue of the statutes and instruments executed thereunder, and consequently the respondents had no right of action whatever to have it declared that they had any right, title, interest or claim thereto.

C. A. Pelletier, Q.C., for appellant.

F. Langelier, Q.C., for respondent.

25 January, 1897.

KEARNEY V. LETELLIER.

Quebec.]

Contract—Sale of goods by sample—Price—Delivery of invoice—Presumption—Evidence.

L. agreed to buy from K. a job lot of tea of which he had samples. Before the tea was delivered L. received an invoice charging a uniform rate per lb. for the lot. Some five months after he was asked to accept a draft for the balance claimed by K. on the sale (L. had accepted for part of the price before), but refused on the ground that the amount was too large, alleging for the first time that the sale was according to the prices marked on the respective samples, and not one rate for the lot. In an action to compel acceptance or in default for payment of the amount, K. swore to the uniform rate and L. to the rate per sample, the latter supporting his evidence by that of his son who testified that K. first applied to him to buy the tea at the sample prices, and was referred to his father; and that of a broker present when the bargain was made who was very vague in his recollection of the actual terms. The Superior Court gave judgment in favour of K., which was reversed by the Court of Queen's Bench.

Held, reversing the decision of the Queen's Bench, Gwynne, J., dissenting, that the receipt of the invoice by L. and its retention without objection for five months, raised a presumption that the

price therein stated was that agreed upon, and that L. had not produced the clear and absolute evidence necessary to rebut such presumption.

Held, per Gwynne, J., that in this case no such presumption was raised by the retention of the invoice.

Appeal allowed with costs.

Fitzpatrick, Q.C., for the appellant.

Languedoc, Q.C., & Dorion, for the respondent.

25 January, 1897.

ADAMS V. McBEATH.

British Columbia.]

Will—Undue influence—Evidence.

A. brought an action in the Supreme Court of British Columbia, to set aside the will of his uncle in favour of M., a stranger in blood to the testator, alleging that its execution was obtained by undue influence of M. at a time when the testator was mentally incapable of knowing what he was doing. The evidence at the trial showed that A. and the testator corresponded at intervals between 1878 and 1891, and the earlier letters of the latter expressed his clear intention to leave his property to A., while in the latter that intention seemed to be modified if not abandoned.

The circumstances attending the testator's last illness and the execution of his will were as follows: He was 84 years old and lived entirely alone. A neighbour not having seen him go out for two or three days notified one of his friends, who got into the house and found him lying on the floor where he had fallen in a fit, and lain for three days. He sent for a doctor and meanwhile did what he could himself to aid him. When the doctor came he pronounced the testator to be nearing his end, and M., who was notified or heard of the matter, came and had him conveyed to his own house. The next day M., according to his own testimony, at the testator's request, went to a solicitor whom he instructed to draw a will for the testator in his (M's) favour. The solicitor prepared the will, brought it to the house where the testator was, read it over to him, and asked him if he understood it, and having answered that he did the testator executed the will which the solicitor and M.'s brother-in-law witnessed. M. was present all the time the solicitor was in the house. The

doctor who attended the testator swore at the trial that he was, though very weak and low, mentally capable of attending to business, and of understanding what was said to him. It was proved, also, that a short time before his seizure he had drafted a will in favour of A., his nephew, but did not execute it. He died a week after executing the will attacked in the action.

Held, affirming the judgment of the Supreme Court of British Columbia (3 B.C. Rep. 513) that it was not sufficient for A. to prove merely circumstances attending the execution of the will consistent with the hypothesis that it might have been obtained by undue influence; they must be inconsistent with a contrary hypothesis, and what was proved in this case did not fulfil this condition.

GWYNNE, J., dissenting, held that the facts proved were sufficient to justify the court in setting aside the will.

Appeal dismissed with costs.

Moss, Q.C., for the appellant.

S. H. Blake, Q.C., for the respondent.

COURT OF APPEAL.

LONDON, 29 January, 1897.

Before LORD ESHER, M.R., LOPES, L.J., RIGBY, L.J.

JONES v. GERMAN (32 L. J.)

Justice of the Peace—Jurisdiction—Search-warrant—Information containing no allegation of felony.

Appeal of plaintiff from judgment of Lord RUSSELL, L.C.J., for defendant on further consideration (65 Law J. Rep. M. C. 212).

Action for illegal arrest, false imprisonment, and trespass to goods ensuing upon a search-warrant granted by the defendant as a justice of the peace.

The allegation of the plaintiff was that the warrant was granted illegally and without jurisdiction, because the information, the words of which are set out in the report of the case below in 65 Law J. Rep. M.C. 212, did not charge the commission of any criminal offence and did not specify the goods for which the search was desired.

Lord Russell, L.C.J., gave judgment for the defendant.

The plaintiff appealed.

Their Lordships held that, although it might be that the information was irregular, there was to be collected from it a fair intendment that the plaintiff's master suspected on reasonable grounds that the plaintiff, his servant, had stolen goods, and that the magistrate had jurisdiction to grant the warrant.

Appeal dismissed.

A RETROSPECT OF COMPANY LAW.

Looking back with the experience of thirty-five years, what are we to designate as the chief defect in the working of the company system? Not the statutory machinery. That has worked well. Not the losses of creditors, though they have been considerable. Not the glowing falsehoods of prospectuses. The real defect, the cardinal vice, has been that the company has been too much the mere puppet of the promoter, and has had contracts fastened on it in its helpless infancy which never ought to have existed. We know the *modus operandi* well. The unscrupulous promoter having got something marketable—a patent, a concession, or a mine—sets himself to palm it off on the public at an exorbitant price. For this purpose he forms the company, drafts its memorandum and articles, furnishes it with directors, perhaps qualifies them, and then presents to the company—that is, his director-nominees—for acceptance a cut-and-dried contract made with a trustee for the company. The purchase is improvidently adopted at the first board meeting, and the company stands committed to a ruinous bargain, starts waterlogged, and shortly founders. The directors—good easy men—may not actually mean to betray the company, but they may not be men of business, or they may be dupes of a plausible promoter, or they may say to themselves: “Here is the company's memorandum. The company was formed to carry out this very agreement.” The result, whatever the reasoning, is the same: the company is made the prey of the promoter-vendor, and is commercially lost by over-capitalization. Unfortunately, this evil is as rife to-day as it was thirty years ago, only instead of the promoter we have the promoting syndicate.—*Law Journal* (London).

THE CHIEF REQUISITE FOR SUCCESS AT THE BAR.

In an address on the above subject, delivered at a recent banquet of the Illinois State Bar Association, by Hon. George R. Peck, the speaker observed :

"If success at the bar were to be measured by me some one worthier should have answered this toast. I suppose the toast means success in getting cases and winning them. But what is the chief requisite in getting cases? Is it learning? Undoubtedly learning is necessary, but it is not the chief requisite. We have all seen too many melancholy examples of learned lawyers who have not been successful. Is it industry? We are told persistent efforts and constant labor will accomplish many things, but they are not the chief requisites in law. Is it eloquence? Eloquence may win over a jury, though the verdict is set aside by the judge a moment later. It may go into a national convention and take away the presidential nomination from gray-haired men who have grown old in the country's service. The chief requisite for success at the bar is judgment and common sense—the harmony of all the faculties which makes the vision true. Judgment and common sense have made all the success achieved at the bar."

SHOOTING OF ESCAPING CONVICTS.

The shooting on Dartmoor of the convict Carter while attempting to make his escape raised the serious question whether the warder was justified in shooting the prisoner, and we are not at all sure that in the interests of prison discipline and public right the whole circumstances should not be re-examined before a Court of assize, notwithstanding the verdict of the coroner's jury, so that a full inquiry may be had into the present system of control over convicts who are working outside their prison walls. The answer to the question turns on the general law, and on the particular instructions of the Home Office as to the duties of warders. Certain instructions issued prior to 1852, and a revised version of that year, were cited to the coroner as justifying the act of the warder. We have vainly endeavoured to obtain a copy of these instructions, and to find any statutory authority for their issue; and they appear to be mere regulations for the conduct and discipline of prisons, and not to have

any effect in altering the common law duties and liabilities of prison officials, who, like soldiers, are subject to the ordinary law. So that in substance the acts of a warder can be justified, if at all, by reference to the duties of gaolers and officers of justice in preventing an escape or in pursuit of a fugitive felon. The convicts by escaping were committing a felony under the Transportation Act of 1824. The deceased convict Carter was in flight, not in resistance, but the day was foggy, and the chances of escape increased by the risk of his getting out of sight if not promptly stopped, and the warder before shooting had called out "Stop, or I will fire." The warder clearly had a legal duty to prevent the escape and to recapture the fugitive if possible, and while one of the Home Office Rules forbade guards to shoot at prisoners except in case of violence or threatened violence (*i.e. se defendendo*), another stated that it was the first duty of a guard to prevent the escape of a prisoner. But his justification must rest on the question whether, having legal authority and duty to apprehend the fugitive, he reserved his fire until it was reasonably clear that without firing he could not prevent his escape, although the circumstances did not involve any direct resistance by the fugitive felon.—*Law Journal*.

CARRIERS—FAILURE TO HEAT CAR—DAMAGES.

In *Taylor v. Wabash R. R. Co.*, decided by the Supreme Court of Missouri in December, 1896 (38 S. W. R., 304), the action was for damages, on the theory that plaintiff suffered a severe illness, and impairment of his ability to work, as a direct consequence of a cold which he contracted while a passenger in defendant's railway car. There was evidence to the effect that the car was very cold; that plaintiff notified the trainmen of his suffering, and repeatedly requested them to make a fire; that there were stoves in the car, and defendant could easily have supplied the needed heat. It was held that the merits of plaintiff's case should have been submitted to the jury. It was further held that it was a question for the jury whether plaintiff was chargeable with contributory negligence because he did not leave the car at some station, made no effort to procure additional wraps from his trunk in the baggage car, took off his overcoat at one time to give his wife the benefit of its warmth, and wore

inadequate clothing to meet the demands of the climate and season. The court said, in part:

1. By accepting plaintiff as a passenger upon the train, defendant became obliged to discharge some other duties toward him beyond that of mere safe carriage to the plaintiff's destination. The principles of the common law, as applied to the circumstances of travel at this day and in this country, require of the carrier of passengers by railroad a certain measure of attention which we believe the defendant in this action did not fully meet. To quote a recent writer on this topic: "The duty of the carrier extends, not only to the furnishing of safe vehicles, but also to the supplying them with such accommodations as are reasonably necessary for the welfare and comfort of his passenger. This duty would undoubtedly include the supplying them with seats, if a day car or vehicle; with proper berths, if a sleeping car; with warmth in cold weather; with light at night," etc.; Hutch. Carr. Mechem's 2d. Ed., 1891, Sec. 515d. In the case at hand defendant was notified of the plaintiff's suffering from want of proper or sufficient heat in the car. Notwithstanding such notice repeatedly given, defendant omitted to comply with the demands of its duty, although it appears from the evidence that the train made many stops at stations along the route.

Defendant, it may fairly be inferred, had ample opportunity to supply the needed heat, had it seen fit. Such, at least, is the showing of facts which plaintiff makes, and the truth of it he is entitled to have submitted to the proper triers of the facts. The plaintiff's case is not founded on any claim for mere discomfort on his journey. It is founded on the theory that he ultimately suffered a severe illness and impairment of his ability to work, as a direct consequence of the cold he contracted on the ride with defendant of which he complains. His testimony tends to sustain that theory; and he was, we think, entitled to go to the jury upon it; *Turrentine v. Railroad Co.* (1885), 99 N. C. 638; *Hastings v. Railroad Co.* (1892), 53 Fed. 224; *Railway Co. v. Hyatt* (1896, Tex. Civ. App.), 34 S. W. 677.

2. It is insisted by the defendant that the plaintiff is chargeable with contributory negligence in several ways. First, that he did not leave the train at some station along the line, when he found the cold unbearable; second, that he made no effort to get at his trunk in the baggage car, wherein he had wraps that

would have made him comfortable; third, that he took off his overcoat at one time during the night in order to give his wife the benefit of its warmth; and fourth, that he wore inadequate clothing to meet the demands of the climate and the season. It does not seem needful to indulge in any extended comment on this branch of the case. Whatever force the facts above mentioned may rightly have as evidence of negligence on the plaintiff's part, we consider that none of them is of such a nature as would justify a court in declaring as a matter of law that plaintiff was negligent. Nor do all of said facts warrant such ruling. On those facts the question of plaintiff's contributory negligence is one to be decided by the jury. It is only where the plaintiff's own evidence, in a case like this, is of such a character as permits no other reasonable inference than that he was negligent, that the court may properly deny him the right to have the jury say whether or not his conduct comes up to the standard of ordinary care of the average man in the same circumstances. The learned trial judge was in error in taking the case from the jury.

IMPEACHMENT OF ONE'S OWN WITNESSES.

The binding rule of law, inhibiting the impeachment of one's own witnesses, is sometimes denied in cases where the parties to the litigation are called as witnesses, says the *National Corporation Reporter*. But there is no distinction in the law, as again shown by the approved ruling in *Crespi v. People* (46 Pac. 863). The action was criminal libel, and a part of the libellous matter was a published charge that the complaining witness, Almagia, himself a newspaper editor or proprietor, was paid by the "camorra" to libel and vilify certain people. (By "camorra" is understood to have been meant a clique, ring, cabal, or confederation of Italians in the city, banded together for dishonest and dishonorable purposes). Defendant undertook to prove the existence of this camorra and Almagia's connection with it. He called Almagia to the stand, as his own witness, and asked him, with specifications of time, place and persons present, if he had not stated that he had instituted the prosecution of defendant at the instance of others. Almagia answered that he had not. Defendant then sought to impeach him by showing that he had made this statement. The Court refused to admit the impeach-

ing evidence. This ruling is complained of. It was clearly right. It was an attempt by a party to impeach his own witness, not because that witness had given hostile evidence which had taken him by surprise, but because he did not admit what was sought to be elicited from him. Indeed, he was apparently questioned for the sole purpose of impeachment. Such practice is not permissible. (*People v. Jacobs*, 49 Cal. 384; *People v. Mitchell*, 94 Cal. 556; 29 Pac. 1106).

PRIVILEGES OF COUNSEL.

The Supreme Court of Tennessee, in a recent case, passed, incidentally, upon the novel question of the right of counsel to shed tears before a jury. The case was *Ferguson v. Moon*, for breach of promise and seduction. It had been assigned as error that counsel for plaintiff in his closing argument, in the midst of a very eloquent and impassioned appeal to the jury, "shed tears and thus unduly excited the passions and sympathies of the jury in favor of the plaintiff, and greatly prejudiced them against defendant." The court confessed itself unable, after diligent search, to find any direct authority on the point, the conduct of counsel in presenting their cases to juries being a matter which must be necessarily left largely to the ethics of the profession and the discretion of the trial judge. The court concluded:

"No cast-iron rule should be laid down. To do so would result that in many cases clients would be deprived of the privilege of being heard at all by counsel. Tears have always been considered legitimate arguments before the jury and we know of no power or jurisdiction in the trial judge to check them. It would appear to be one of the natural rights of counsel which no statute or constitution could take away. It is certainly a matter of the highest personal privilege. Indeed, if counsel have tears at command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises, and the trial judge would not feel constrained to interfere unless they are indulged in to such excess as to impede, embarrass, or delay the business before the court. In this case the trial judge was not asked to check the tears and it was, we think, a very proper occasion for their use, and we cannot reverse for this reason; but for other errors indicated the judgment is reversed and cause remanded for a new trial."

COMPANY CASES IN 1896.

Co-operative enterprise has been unparalleled during 1896. The number of companies registered in the past year has been 4,236, without counting reconstructions. Of these at least one-third, according to the estimate of the Registrar of Joint Stock Companies, belong to the category of private companies. In view of this fact—of the frequency of one, two, or three persons incorporating themselves through the machinery of the Companies Act, 1862, and trading with limited liability—incomparably the most important judicial decision of the past year is that of the law lords in *Salomon v. Salomon*. To some the novel kind of corporation sole which that decision sanctioned is an alarming phenomenon, but in truth it is only a natural corollary of limited liability. When once the Legislature accepted that principle, it transferred the centre of commercial gravity from the company to its capital. What the persons dealing with the company give credit to is the fund dedicated to the trading, and whether it is contributed by one-man, or 100, or 100,000 is as immaterial as it is whether the contributors are French or English, Germans or Jews.

“One-man” companies is not the only matter in which the House of Lords have illuminated the law. They have by a judicial construction of the public examination section cut down its operation to something very harmless (*Ex parte Barnes*); indeed, the official receiver would say, annihilated the utility of the section altogether. Only the promoter or director against whom a *prima facie* case of fraud is found can now be put on the rack; for the rest, the official receiver must do his best with section 115. The significance to officialism of this decision is considerable, for with the exit of the public examination as an all-round method of inquisition, the *raison d'être* of a winding-up by the Court in great measure disappears. Voluntary winding-up is as good, if not better; consequently, for one company that comes to be liquidated in the winding-up department, ten are liquidated outside it. *Hinc illæ lacrymæ!* One more decision of first-rate importance during the year has been that defining the legal position of auditors, their duties and liabilities (*In re The Kingston Cotton Mills Company*). The result is just and fair. The auditor—to sum it up—is an officer of the company, but of him, as of any other professional expert, it is only required that

he should use reasonable care. He is not required to suspect fraud unless there is something to suggest it, still less is he an insurer. He is, in a word, a watch-dog, not a blood-hound. These are the three chief corner-stones which have been added to the edifice of company law during the past year.

Underwriting cases have been specially numerous, evidencing both how common this practice of underwriting has become in commercial circles for securing the flotation of a company, and also the lamentable laxity with which these tripartite contracts are drawn.—*Law Journal (London)*.

ADVANTAGES OF DEFINITE AND CORRECT EXPRESSION.

There is no science, said Judge Bradley, in an address to law students, in which the words and forms of expression are more important than in the law. Precision of definition and statement is a *sine qua non*. Possessing it, you possess the law; not possessing it, you do not possess the law, but only the power of vainly beating the air. It is of the utmost importance to the student of the law to acquire, besides a knowledge of the law itself, the power of expressing it in correct and appropriate language, such as is found in books of authority. One of the best aids to the accomplishment of which I speak is to choose some author of pure and accurate diction, and make his work a *vade mecum*, until you have become so familiar with its contents that, although not absolutely committed to memory, the words and forms of expression will spontaneously suggest themselves whenever you begin to speak or write on the subject. Of course, there can be no doubt what book should be chosen for this purpose. There is nothing to compare with Sir William Blackstone in completeness of scope, purity and elegance of diction, and appositeness, if not always absolute accuracy, of definition and statement. One of the greatest, if not the greatest, of forensic speakers, as well as lawyers, that I ever knew, was the late Mr. George Wood, of New York—in his early days a leader of the Bar of New York. I have often hung upon his lips with chained attention, even when opposed to him in a case, and can truly say that I never enjoyed a greater intellectual treat than in listening to his arguments. Now I happen to have heard.....an

account of the method which he pursued for acquiring his wonderful command of choice juridical diction. It was his custom for many years.....to read a chapter of Blackstone of a morning, and then take a long walk and repeat to himself all that he could remember of what he had read, even to the very words and phrases in those parts that were important, such as definitions and the like.....and in this way he went through the commentaries until they were perfectly mastered, both in matter and form, so that he became almost a walking commentary himself. His case illustrates the oft-repeated injunction, "Beware of the man with one book," and when the one book mastered in this way is such a book as Blackstone's Commentaries, it is easy to comprehend what power and beauty may be acquired and laid by for future use in the display of forensic eloquence.

GENERAL NOTES.

JUDICIAL KNOWLEDGE.—The story runs that the Fellows of the Common Room at Trinity, provoked at the omniscience of Dr. Whewell, once laid a plot to disconcert and humble that *helluo librorum*. With this object they got up 'Chinese Metaphysics' in the 'Encyclopædia Britannica,' and then casually started the topic after dinner and flaunted their recondite knowledge, as they hoped, to the dismay of the Doctor. At last one of them propounded some theory on the subject which aroused the attention of the master. 'Why,' he said, 'that's been exploded long ago. You must have been reading my old article on "Chinese Metaphysics" in the "Britannica"! We are reminded of this story by the little interlude which took place between Baron Pollock and counsel recently. It was about some dealings in stocks. 'Perhaps I ought to explain to your lordship,' said the ingenuous counsel, 'the meaning of the word "contango," as your lordship may not be acquainted with it. It is a term employed on the Stock Exchange——' 'Thank you, Mr. X.,' said the learned Baron, 'but as I was for several years counsel for the Stock Exchange, you need not labour the point. I think I understand it.' The judicial innocence of mundane matters, whether stage or Stock Exchange, manifested by judges is sometimes amazing, but under this white-robed innocence we not infrequently find an equally amazing amount of worldly wisdom surviving from the experiences of the Bar.—*Law Journal*.

VARNISHING CRIMINALS.—An English custom of not very ancient date was to hang smugglers on gibbets arranged along the coast, and then tar the bodies that they might be preserved a long while, as a warning to other culprits. As late as 1822 three men thus varnished might have been seen hanging before Dover Castle. Sometimes the process was extended to robbers, assassins, incendiaries and other criminals. John Painter, who fired the dockyard at Portsmouth, was first hanged and then tarred in 1776. From time to time he was given a fresh coat of varnish, and thus was made to last nearly fourteen years. The weird custom did not stop smuggling or other crime, but no doubt it had some influence as a preventive.

MARRIAGE AND DIVORCE.—Twice as many widowers marry again as widows. Is this a proof of woman's superior constancy? The return moved for by Mr. Henniker Heaton as to the number of divorce suits tried during 1894 shows that out of a total of 443 suits, 205 were instituted by wives, 238 by husbands. Is this any criterion of the relative fidelity of the spouses? Surely not. One reason that the wife's suits are fewer is that the wife has, rightly or wrongly, more to prove, adultery *plus* cruelty, or adultery *plus* desertion; the husband only adultery. But the main reason is that the wife has a great deal more to lose by the breaking-up of the home, and to save that and for the sake of the children she condones many offences which she might drag before the Court. There are more patient Griseldas in these days than is generally supposed, though Chaucer thought it would be hard to find one. When a wife does bring her suit she more often succeeds—so the statistics show—than the husband does, which is some evidence that she only invokes the Court in gross cases. These considerations are necessary because the return on the face of it would seem to suggest that the husband is more often the injured party than the wife, a conclusion quite at variance with common experience. There is nothing, it has been well said, so fallacious as facts—except figures.—*Law Journal*.

LARCENY.—Two of the most unique cases of thieving on record are being investigated in Haverhill. One is the stealing of 15,000 live fish, and the other the theft of a big stone wall surrounding the cemetery of the Hebrew Burial Association. This is believed to be the first instance ever chronicled of the larceny of a stone wall from a graveyard.—*Albany Law Journal*.

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CURRENT TOPICS AND CASES.

The Court of Appeal at Montreal, on the 24th February, reversed the decision of the Superior Court, Archibald, J., in *Cusson v. Delorme*, referred to on p. 8 of this volume, and since reported in Quebec Reports, Vol. 10, S. C., p. 329. The case presented an interesting and important question as to the rights and obligations of the parties where a person in erecting a wall has inadvertently encroached a few inches on his neighbour's land. Can the neighbour ask for the demolition of the wall, or merely for the value of the land taken? The court below declined to maintain the action for the demolition of the wall, considering that there was proof of acquiescence and renunciation of right by the plaintiff, and also taking into consideration the fact that the value of the land taken was extremely insignificant. The Court of Appeal has set aside that judgment and maintained the action for demolition, the grounds for reversal being briefly as follows:—The fact that the respondent acted in good faith did not justify him in erecting his wall before he had ascertained the true line of division. The court was of opinion, as a matter of fact, that there had been no acquiescence on the part of the neighbour in the line

built on, and further, that while the construction of the wall was proceeding, appellant notified respondent that he was encroaching. Subsequently appellant resorted to an action *en bornage*, and the encroachment was established. The Court of Appeal considered that the value of the land was not so insignificant as to justify the application of the maxim "*de minimis non curat lex*." The action for demolition was therefore maintained.

In the case of *Plummer v. Gillespie*, referred to, *ante*, p. 2, the Court of Appeal (Feb. 24) unanimously affirmed the judgment of Mr. Justice Archibald, since reported in Q. R., 10 S. C. 243. The underlying principle of the decision seems to be that services volunteered by strangers or outsiders do not give them a legal title to remuneration against the party to whom the services are rendered, where there is no evidence whatever that the latter requested or recognized the service in any way, or was even aware that it was rendered; and the alleged usage to the contrary, in the case of real estate agents, it was held, had not been established.

The Quebec Statutes, 60 Victoria, have been issued, and contain some matters of special interest. The draft code of procedure prepared by the commission charged under 57 Vict., ch. 9, with the revision of the Code of Procedure, has been finally adopted, but the provisions respecting the Code of Procedure passed during the last session have to be embodied, and when the roll is completed and deposited the Code is to be brought into force by proclamation. It is to be regretted that these amendments could not have been incorporated before the end of the session, and the whole enacted as one statute, as difficulties may possibly arise with respect to the changes made by the commission after the draft was approved by the legislature. The changes made in the Code of Pro-

cedure render necessary certain amendments in the Revised Statutes of Quebec, and these are enacted by chap. 49.

The New York State Library has just issued its seventh annual comparative summary and index of state legislation, covering the laws passed in 1896. Each act is briefly described or summarized and classified under its proper subject-head, with a full alphabetical index to the entries. Perhaps the most important legislation of the year was that enacted by the people directly through their votes upon the numerous constitutional amendments submitted to them. The bulletin records the amendments defeated as well as those adopted, a special table arranged by states being inserted for convenient reference. It is of interest to note that of 57 separate constitutional amendments voted on, only 24 were adopted. There is a steadily growing appreciation of this bulletin by all persons interested in improving state legislation. It is already widely used and aids materially in raising standards and promoting uniformity in the laws of the different states. It is proposed that the eighth bulletin shall consolidate into a single series with the legislation of 1897 the summaries for the preceding seven years. This material will be closely classified and so presented as to give a clear view of the general progress of legislation for the eight years ending in 1897.

Lamond v. Richards (pp. 70, 71 of this number) is a case of great interest to hotel-keepers, inasmuch as the law as laid down by the Court of Appeal, enables them to eject any traveller, without assigning cause, after he has made a stay of moderate length. The case seems to have been hotly contested, but the hotel won in all three courts.

SUPREME COURT OF CANADA.

OTTAWA, 25 January, 1897.

Quebec]

MACDONALD v. WHITFIELD.

WHITFIELD v. THE MERCHANTS BANK.

*Principal and surety—Judgment against sureties—Discharge of one
—Trust funds—Rights of co-sureties—Guarantee.*

A bank holding judgments against several sureties released one, reserving his recourse against the others, with a declaration that the release gave no warranty against claims the other sureties might seek to enforce against the one released by reason of the exercise of the recourse reserved. The surety released had at the time a sum of money in his hands to be applied towards payment of the bank's debt.

Held, that notwithstanding the release said surety could be compelled by his co-sureties to pay such moneys to the bank, or to the co-sureties if the bank had been paid by them.

Held also, that the bank was not liable as a warrantor to the sureties not released, having entered into no agreement creating an obligation in guaranty towards them.

Appeal dismissed with costs.

Geoffrion, Q.C., and *Fleet*, for appellant Macdonald.

Abbott, Q.C., and *Taylor* for Whitfield.

Abbott, Q.C., for Merchants Bank.

25 Feb., 1897.

Quebec]

MCGOEY v. LEAMY.

*Appeal—Bornage—Agreement as to—Title to land—Future rights
—R.S.C., c. 135, s. 29—54 & 55 V., c. 25, s. 2.*

The owners of contiguous lands with no established line of division agreed by notarial deed to have such line established by a surveyor, but one owner refused to accept the surveyor's report, and to acquiesce in the boundary thereby fixed. In an action by the other owner to have the same declared the true

line of delineation, the Court of Queen's Bench held that the report did not bind the parties.

Held, that the judgment affected title to land and might bind future rights, and an appeal therefrom would lie to the Supreme Court.

Foran, Q.C., for the appellant.

Geoffrion, Q.C., and *Champagne*, for the respondent.

25 Jan., 1897.

Ontario.]

CITY OF KINGSTON v. DRENNAN.

Municipal corporation—Negligence—Snow and ice on sidewalks—

By-law—Construction of statute—55 V., c. 42, s. 531—57 V., c. 50, s. 13—Finding of jury—Gross negligence.

A by-law of the City of Kingston requires frontagers to remove snow from the sidewalks. It was allowed to remain on the crossings which were therefore higher than the sidewalks, and when pressed down by traffic an incline more or less steep was formed at the ends of the crossings. A young lady slipped and fell on one of these inclines, and being severely injured, brought an action of damages against the city and obtained a verdict.

The Municipal Act of Ontario makes a corporation, if guilty of gross negligence, liable for accidents resulting from snow and ice on sidewalks; notice of action in such case must be given, but may be dispensed with on the trial if the Court is of opinion that there was reasonable excuse for the want of it, and that the corporation has not been prejudiced in its defence.

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that there was sufficient evidence to justify the jury in finding that the corporation had not fulfilled its statutory obligation to keep the streets and sidewalks in repair; *Cornwall v. Derochie* (24 Can. S. C. R. 301) followed; that it was no excuse that the difference in level between the sidewalk and crossing was due to observance of the by-law; that a crossing may be regarded as part of the adjoining sidewalk for the purpose of the act; that "gross negligence" in the act means very great negligence of which the jury found the corporation guilty;

and that an appellate court would not interfere with the discretion of the trial judge in dispensing with notice of action.

Appeal dismissed with costs.

Walkem, Q.C., for the appellants.

Hutchison, for the respondent.

NOTE.—In our last issue, in *Salvas v. Vassal*, p. 49, for "Appeal dismissed" read "Appeal followed."

QUEEN'S BENCH DIVISION.

LONDON, 22 January, 1897.

LAMOND V. RICHARDS AND THE HÔTEL MÉTROPOLE COMPANY.
(32 L.J.)

Innkeeper—Duty to receive guest—Traveller—Right to eject guest.

Appeal from Brighton County Court.

The plaintiff, who had stayed for some months at the Hôtel Métropole at Brighton, went out for a short time on August 31, 1896, and on her return was refused admittance. It appeared that she had paid her bill regularly, and that there was sufficient accommodation for her in the hotel, but she had received notice to quit. The plaintiff brought an action against the defendants for damages for unlawfully expelling her. The County Court judge held that the plaintiff had ceased to be a 'traveller,' and that the defendants were not therefore bound in law to allow her to remain in the hotel after reasonable notice to quit had been given. He gave judgment for the defendants.

The COURT (WRIGHT, J. and BRUCE, J.) held that the common law obligation of an innkeeper to receive guests extended only to travellers; that the plaintiff had in August, 1896, ceased to be a traveller; and that the defendants were therefore entitled, after giving reasonable notice, to eject her.

Appeal dismissed.

COURT OF APPEAL.

LONDON, 22 February, 1897.

LAMOND V. RICHARDS ET AL. (32 L.J.)

Innkeeper—Common inn—Traveller continuing to stay at inn and abandoning intention to proceed—Liability of innkeeper to lodge.

Appeal from decision of Divisional Court (WRIGHT, J., and BRUCE, J.) affirming judgment of the judge of Brighton County Court for defendants.

The action was for damages for illegal expulsion from the Hôtel Métropole at Brighton, of which the defendants were the manager and proprietors.

The plaintiff went to the defendants' hotel in the autumn of 1895, and stayed there until the end of August, 1896, paying her bill regularly.

In August, 1896, the defendants gave to the plaintiff reasonable notice to quit the hotel, and when she failed to do so, during her absence from the hotel for a short time, packed up her goods and placed them in the hall of the hotel, and on her return refused to allow her to enter the hotel.

The County Court Judge held that the hotel was a common inn under the common law liability to afford accommodation to travellers coming to it, and that there was nothing in the condition or conduct of the plaintiff to justify the defendants in refusing to provide her with accommodation, but that the plaintiff had long ceased to be a traveller in the ordinary sense of the term, and that therefore the defendants were entitled to determine the accommodation claimed by the plaintiff by reasonable notice, and justified, on her paying no attention to the notice, in preventing her from re-entering the hotel and in placing her goods at the entrance for her to take away. The County Court judge, on these grounds, gave judgment for the defendants.

The Divisional Court affirmed the decision of the County Court judge.

The plaintiff by leave appealed.

Their Lordships (Lord Esher, M.R., Lopes, L.J., Chitty, L.J.) dismissed the appeal, holding that the County Court judge was right in finding upon the whole of the evidence, and taking

into consideration that ten months had elapsed since the arrival of the plaintiff at the hotel, that the plaintiff had ceased to be a traveller, and that the defendants were entitled in those circumstances to terminate the relation of host and guest between themselves and the plaintiff by reasonable notice.

**ELECTION LAW—PRESENTATION OF PETITION—
FORTIETH DAY AFTER POLLING DAY A SUN-
DAY.**

Through the courtesy of Mr. J. A. Chisholm, of the firm of Borden, Ritchie, Parker & Chisholm, barristers, of Halifax, N.S., we are enabled to publish an interesting decision recently pronounced, in the case of *Lowther v. Logan*, by Mr. Justice Weatherbe, of the Supreme Court of Nova Scotia, on a question in connection with election petitions. It will be observed that the learned judge follows the Quebec decision in the case of *Déchêne & City of Montreal*, Q.R., 1 Q.B. 206, confirmed by the Privy Council.

HALIFAX, 16 February, 1897.

LOWTHER v. LOGAN.

WEATHERBE, J. :—

The only preliminary objection relied on is that the petition is too late.

The poll was held on the 23rd of June and the petition was presented on the 3rd of August, which was Monday.

By section 5 of Cap. 20 the petition where there is a contest, must be presented not later than forty days after polling day.

The fortieth day fell upon Sunday.

By section 7 of the Interpretation Act, sub-sec. 26, holiday includes Sunday. By sub-sec. 27 "If the time limited by any Act for any proceeding or the doing of anything under its provisions expires or falls upon a holiday the time so limited shall be extended to and such thing may be done on the day next following which is not a holiday."

It is admitted that there would be a good service if this were mere procedure—a thing to be done in the conduct of a cause such as the service of a pleading, but on the part of respondent

it is urged that this is a matter of right and not procedure, that the petitioner's "title is cut off" by the statute which establishes the immunity of the respondent.

In *Dechêne v. The City of Montreal*, App. Cas. 1894, page 640, a by-law was passed by the Corporation of the City of Montreal appropriating over one million, nine hundred thousand dollars to the expenses of the year.

By a statute of the Province of Quebec previously passed, "any municipal elector may by a petition presented to the Superior Court * * * demand the annulment of any by-law * * * with costs against the corporation, but the right of demanding such annulment is prescribed by three months from the date of coming into force of such by-law * * * and after that delay every such by-law * * * shall be considered valid and binding for all legal purposes whatsoever, provided that it be within the competence of the said corporation." The day after the period of three months from the passing of the by-law expired, the petitioner, a municipal elector, presented a petition to the Court praying for annulment of the appropriation to the extent of \$136,000. The last day of the three months was a holiday, and there was a plea that the petition was out of time. The plea was sustained by the Court of first instance and by the Court of Queen's Bench in Quebec, and was afterwards held good on appeal to the Privy Council.

By section 3 of the Quebec Code "If the day on which any thing ought to be done in pursuance of the law is a non-juridical day such thing may be done with like effect on the next following juridical day."

Another Act, 49 and 50 Vic., cap. 95, sec. 20, was relied on, which is in these words:—

"If the delay fixed for any proceeding or for the doing of any thing expires on a non-juridical day, such day is prolonged until the next following juridical day."

Lord Watson said:—

"The respondents do not dispute that when an action is depending, the rule upon which the appellant relies is applicable to proceedings in the litigation. But they maintain that the statutory title of the appellant to petition the Court and their own statutory immunity, which arises immediately upon the cesser of his title, are matters of right and not of procedure."

After citing sec. 3 above quoted, Lord Watson proceeds:—"In the opinion of their Lordships, that enactment refers *exclusively* to things which the law has directed to be done either by the plaintiff or the defendant *in the course of a suit*, and has no reference to the title or want of title in the plaintiff to institute and maintain it."

The contention of petitioner is, in the words of counsel, that chapter 1 of the Revised Statutes of Canada, section 7, subsections 26 and 27, extends the time for filing the petition to the Monday on which the petition was in fact filed. This provision, it is argued, cannot be restricted to procedure; it in terms applies to anything done under the provisions of any Act of Parliament. And it is further said that in the case referred to there was no such general Act as the above; but simply special regulations regarding procedure were invoked to extend the time for doing an act beyond the time prescribed by the statute on the subject, that is to say, the interpretation clause in the Code of Civil Procedure refers to all the things to be done by authority of that Act and nothing beyond.

Dechêne v. City of Montreal is of course binding, and the above is the distinction I am invited to consider. That is to say, both in the Dominion and our Provincial Revised Statutes, I am to apply the language there to be found in the interpretation acts (equivalent to that discussed by Lord Watson) as applicable not only to "proceedings" in the nature of procedure, but to everything to be done under every Act passed by Parliament and the Province. No authority was cited for this and perhaps there is none to be found. The first question with me is whether I am not relieved from independent judgment by the Judicial Committee of the Privy Council.

Lord Watson, in addition to his reference to the Code of Civil Procedure, refers to sec. 3 (the section of cap. 95 of Vic. 49 and 50 passed after the petition in the case was brought). The language is very similar to our sec. 27.

He did not follow the line of argument addressed to me, namely that the Quebec clauses were simple regulations confined in terms to legislation on the prescribed subject of "procedure." He dealt with the clauses as if they might have application to a statute of limitations or any other statute, or anything to be done by virtue of a statute. He took a ground broad enough I suppose

to apply to our interpretation provisions. He said of the last cited clause:—"Its language is not calculated to suggest that a claimant may bring an action for recovery of land after the period of limitation has run if he can show that the last day or days of that period were non-judicial, and that his claim is preferred upon the first judicial day after its expiry. Yet that would be the logical result of giving effect to the argument of the appellant."

He adds after discussion another objection to the application of the section: "Even if sec. 20 were *prima facie* applicable to the present case their Lordships venture to doubt whether having regard to that reservation it could be permitted to control the plain intentment of the legislature as expressed in the clause which gives a *right of challenge to the appellant*."

I observe so far as I have had access to the Statutes that matters in the Statutes of Quebec under the phrase "Civil Procedure" are not in all cases matters of procedure, but matters of title or right in some instances, which is consistent with the reasoning in *Dechêne v. City of Montreal*.

It was stated at the argument that petitions have been dismissed recently in the Province of Ontario, or Quebec, or both, on the ground raised here. It is a satisfaction to know that if my view is incorrect it may be reviewed.

**BOUNDARIES — COSTS — ARTICLE 504, CIVIL CODE
— DESVOYEUX DIT LAFRAMBOISE & TARTE
DIT LARIVIÈRE.**

We have received communication of the notes of the Hon. Mr. Justice Bossé in this case, which is reported in the *Montreal Law Reports*, 6 Queen's Bench, pages 477-483. The notes in question are not included in the report, but as the case is frequently cited they may be of interest to our readers.

Bossé, J.:—

Motion a été faite pour appeler d'un jugement interlocutoire. Il s'agit, dans cette cause, d'une question qui revient constamment devant la cour, savoir : qui doit payer les frais d'une action en bornage et quelle est la forme dans laquelle le jugement qui ordonne un bornage doit être rendu.

Ici Tarte a sommé Taillefer, son voisin, de consentir au bornage demandé, sous 48 heures. Taillefer n'ayant pas répondu à cette sommation, Tarte a intenté une action contre Taillefer pour procéder au bornage.

Tarte dans son action allègue formellement que Taillefer a empiété sur sa propriété, et il poursuit ce dernier en bornage, se réservant de le poursuivre en dommage plus tard. Alors Taillefer a appelé Desvoyeaux en garantie, et ce dernier a déclaré prendre fait et cause pour Taillefer et a plaidé à l'action, disant que si la ligne de division entre le demandeur et le défendeur n'a pas été bien placée, c'est sans mauvaise intention, et que les défendeurs ont toujours été prêts et le sont encore, à borner mais à frais communs. Le demandeur a répondu que tous les allégués de son action étaient bien fondés et que les allégués de la défense étaient mal fondés. Là-dessus intervint le jugement qui répète les allégations de l'action et de la défense.

(*Judgment quoted.*)

Voilà le jugement rendu et dont on demande appel pour deux raisons :

1. C'est que les défendeurs ne devraient pas être condamnés aux frais, ne s'opposant pas au bornage ;
2. C'est que le jugement ordonne à l'arpenteur d'aller planter des bornes, sans les lui désigner, mais suivant la possession et les titres des parties.

Ce dernier point a été formellement jugé dans différentes causes, entre autres celle de *Loiselle & Paradis*, 1, D.C.A., 264, où il a été décidé que : " C'est la cour qui doit juger où les bornes " doivent être placées ", et dans celle de *Rivard v. La Fabrique de l'Île Perrot*, où il avait été ordonné à l'arpenteur d'aller planter des bornes suivant les titres des parties, il fut jugé que ce n'était pas à l'expert de décider ou mettre les bornes. L'expert est pour éclairer la cour, et c'est à la cour de lui dire, après avoir pris connaissance du rapport, maintenant allez placer les bornes aux endroits qui vous sont indiqués sur le plan.

Ainsi la cour ne peut ordonner d'aller planter les bornes suivant les titres et possessions des parties, ça ne décide rien.

Sur la question des frais.

Cette question a été, aussi, maintes fois décidée.

Dans la cause de *Weynless v. Cook*, 2 L.C.J., 486, il a été jugé : que " les frais d'une action en bornage dans les actions ordinaires, " doivent être supportés en commun."

Cette opinion a été exprimée plusieurs fois, à ma connaissance. "Les frais de bornage doivent être en commun, excepté quand il y a contestation d'une part ou de l'autre, alors c'est la partie qui succombe qui doit payer." C'est aussi ce qui a été décidé dans la cause de *Loiselle v. Loiselle*, 10 L.C.J., 258; dans la cause de *Thornton et al. v. N. Trudel*, 30 L.C.J., 202; dans la cause de *Patenaude v. Charron*, 17 L.C.J. 85. "Les frais de bornage sont communs et ceux du litige sont à la discrétion du tribunal, lorsque il y a contestation." Cependant à Québec on semble suivre une règle contraire, et le juge Casault entretient une opinion différente de celle que nous émettons.

Cette question se décide par l'autorité de l'article du C.C., 504, qui dit "que tout propriétaire peut obliger son voisin au bornage de leurs propriétés contiguës. Les frais de bornage sont communs, ceux du litige, au cas de contestation, sont à la discrétion du tribunal."

Il est évident qu'ici il s'agit d'un bornage judiciaire car s'il n'y avait pas eu de bornage judiciaire, il n'y aurait pas eu de contestation, et, par conséquent, les frais de bornage seuls sont en commun. Les codificateurs disent que c'est de droit ancien; en effet le "N. Denisart", bornage, page 655, dit: "S'il y a eu quelques contestations, ou relatives ou incidentes au bornage, c'est la partie qui succombe qui paie les frais seulement de la contestation."

Pourquoi a-t-on mis cet article dans le code? C'est qu'on a voulu établir une différence entre une action en bornage et une autre action. Les parties ont toujours le droit de se borner en justice, sur demande à cet effet, il n'est pas besoin de donner avis à son voisin, on intente une action et on a le droit d'avoir le bornage en justice; chaque partie paie ses frais, et n'est tenu aux frais de contestation que celui qui a mal à propos contesté la demande. C'est là ce qui est dit dans la cause de *Loiselle* dont l'interprétation a été méconnue par le juge Casault.

En outre du Nouveau Denisart, un auteur de renom, Millet, page 552, dit: "A l'égard des incidents qui peuvent se présenter dans le cours de l'opération et même au début, les frais en doivent être supportés par ceux qui succombent dans leurs prétentions." "S'il n'y a pas de bornes qui existent, le défendeur qui a soulevé une mauvaise contestation, devra payer les frais de la manière mentionnée."

Guay, dans son nouveau traité du bornage, dit : " Les frais de " procédure pour bornage et les frais du jugement qui établit le " bornage doivent être partagés par les parties, etc."

Ainsi tous les auteurs sont unanimes sur ce point. Nous avons, en outre, l'opinion d'un grand nombre de juristes éminents qui abondent dans le sens de l'article 504 de notre code, qui est d'ailleurs très formel sur ce point : Les frais sont en commun, mais celui qui fait une mauvaise contestation, doit en payer les frais.

Dans cette cause-ci, il y a eu contestation à l'occasion du bornage. Ce n'est que lorsque le jugement final sur le point en litige viendra que la question des frais pourra être décidée. Cependant le défendeur a été condamné aux frais, cette raison seule serait contraire au code.

La cour à l'unanimité déclare ce jugement mauvais, et la cour est d'opinion que l'appel doit être accordé.

GENERAL NOTES.

EXCHEQUER COURT OF CANADA.—Special sittings of the Exchequer Court of Canada, for the trial of cases, etc., will be held for the year 1897, at the following times and places, provided that some case or matter is entered for trial or set down for hearing at the office of the Registrar of the Court, at Ottawa, at least ten days before the day appointed for such sitting, viz. :—

At the Court House, City of Ottawa, Ont., Monday, 29th March, at 11 a.m. At the Court House, City of Toronto, Ont., Tuesday, 6th April, at 11 a.m. At the Court House, City of Montreal, P.Q., Tuesday, 13th April, at 11 a.m. At the Court House, City of Quebec, P.Q., Tuesday, 20th April, at 11 a.m. At the Court House, City of Ottawa, Ont., Monday, 26th April, at 11 a.m. At the Court House, City of St. John, N.B., Thursday, 20th May, at 11 a.m. At the Court House, City of Halifax, N.S., Tuesday, 25th May, at 11 a.m. At the Court House, City of Ottawa, Ont., Monday, 7th June, at 11 a.m.

SERJEANTS' RINGS.—There has just been added to the library of the Inner Temple an interesting little collection inscribed 'Serjeants' Rings.' It contains, says the *Pall Mall Gazette*, four gold rings which once belonged to Serjeants Channell (1840),

Crompton (1852), Ballantine (1856), and Field (1875) respectively. The dates are those of their being made serjeants. All these gentlemen, except Ballantine, became judges; Lord Field alone survives. On each ring is engraved the motto the serjeant took. Channell's is 'Quid quandoque deecat'; Crompton's 'Quaerere verum'; Ballantine's 'Jacta est alea'; and Field's 'Fais ce que dois, avienne que pourra.'

A TRUSTEE IN A DIFFICULTY.—The *London Law Journal* refers to a case before Mr. Justice Williams, which illustrated a case of hardship where no one is to blame. The victim of the law or of circumstances was a trustee under a deed of arrangement, and the Board of Trade was proceeding against him for not rendering an account of his stewardship. The "estate" had realized £3 5s. The disbursements were £3 10s. The Board called for an account; the trustee rendered it, but he neglected to stamp the account, as required by the rules, with a 5s. stamp, and the Board refused to receive it unstamped. "We have no power," said the Board, "to dispense with the stamp. It belongs to the Inland Revenue. We are bound by the Act to exact the 5s." "I have no assets," pleaded the trustee. "I don't like sending a man to prison," said the judge, "unless he is contumacious." Each plea was in its way unanswerable. In the end the trustee was ordered to pay, but the Court intimated that it was not a case for incarceration.

A QUESTION OF COSTS IN ENGLAND.—An attempt was made recently in an action for false imprisonment, which had resulted in nominal damages against one defendant and a verdict in favour of the other, to render the plaintiff's solicitor personally liable to the successful defendant for his costs. It failed, however, because, although the plaintiff was undoubtedly without means, the judge was not satisfied that the action as against this defendant was frivolous and vexatious. There are numerous instances of a solicitor having been ordered to pay the costs of the opposite party. Most of them are cases in which the solicitor has brought an action without authority from the client, or has taken proceedings which must clearly be futile, either for an impecunious client or for one out of the jurisdiction, or has guaranteed the client against the costs of the proceedings, and thereby made the action his own. The mere fact that a solicitor

has undertaken an unsuccessful action for an impecunious client is not, and ought not to be, a reason for mulcting him in the other party's costs; but before beginning the action he may be obliged to satisfy himself by all reasonable inquiries of the worth of his client's case, and, for having neglected to do so, the solicitor in this particular litigation was refused his costs of successfully opposing the application.—*Law Journal*.

PHOTOGRAPHY IN THE DETECTION OF CRIME.—The *Tagliche Rundschau* mentions a practical use of photography in the detection of crime that is novel and ingenious. The murder of a woman was traced to one of two men—her husband and a neighbour. Each had hairs upon his clothes. Dr. Jeserich, "the inventor of criminal photography," photographed the clothes of the suspected men, and the camera disclosed the fact that the hairs on the husband's clothes were from his wife's head, while the other prisoner had hairs from his own head on his clothing. The same scientist has shown that the differences in inks used in writing and in altering a document can be shown clearly in a photograph of the document. Even on surfaces from which, to the eye, all trace of writing has been erased, the camera reveals legible characters; and the forger or thief fails of his purpose of irrevocably destroying the original purport of the document with which he tampers.

"TRUTH."—It was one of the delights of the late Lord Coleridge to profess ignorance of things supposed to be of common knowledge. In a newspaper libel action his lordship, in his most silvery tones, asked, "What is 'Truth'?" "It is a newspaper, my Lord," replied counsel. "Oh!" said his lordship, preserving his simplicity and splendid gravity; "isn't that an entirely new definition?"—*Legal Adviser*.

PHOTOGRAPHS AS EVIDENCE.—Evidence was being taken as to the value of certain water privileges, and photographs were put in of the *locus in quo*. The fall in question was only some few inches, but the photographer's art had improved on it. Counsel wishing to magnify the descent of water, and the consequent value of the right to use it, holds up the picture and remarks: "Why, my Lord, it is a perfect cataract." C. M. —, Q. C., in his dry way, replies: "On investigation, my Lord, the cataract will be seen to be in my learned friend's eye."

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CURRENT TOPICS AND CASES.

The reports of cases in England, France and the United States show that considerable difficulty has been experienced by the courts of these countries in defining the precise extent to which the members of trade unions may lawfully go in carrying out the objects of their organization. The case of *Gauthier & Perrault*, decided by the Court of Appeal, at Montreal, on the 24th February, shows that a similar difficulty has been felt here, the members of the three courts being as equally divided as it was possible to be,—Mr. Justice Davidson in the Superior Court (6 C. S. 83), Mr. Justice Mathieu in the Court of Review (10 C. S. 224), and Chief Justice Lacoste and Justices Wurtele and Ouimet in the Court of Queen's Bench, being of opinion to dismiss the action of the respondent Perrault, a non-union workman, against the members of the union, while Justices Jetté and Tellier in the Court of Review, and Justices Bossé and Blanchet in the Court of Queen's Bench, were of opinion that the action should be maintained. Of the nine judges who pronounced on the case, four were in favor of sustaining the demand, and five were for dismissing it. The result is that the original judgment pronounced by Mr. Justice Davidson, dismissing the action, is restored and affirmed.

The Court of Appeal differed to some extent, but not materially, from the Court of Review in its conclusions on the facts, but the principle is laid down by the majority of the first mentioned court that a workmen's union, one of the rules of which prohibits members from working in any place where non-members are employed—without, however, imposing any penalty for breach of the rule except the loss of beneficial rights in the society—is not an illegal association, and does not constitute a conspiracy against workmen who are not members. It was further held that workmen who, without threats, violence, intimidation, or the use of other illegal means, quit work because a non-union workman is employed in the same establishment, incur no responsibility towards the latter. The majority of the court were also of opinion that the plaintiff Perrault, having left his work voluntarily, notwithstanding an intimation from his employer that he was at liberty to stay, had not suffered any damage recoverable at law. The answer to this by the dissentient members of the Court, is that it was impossible for Perrault to do otherwise, because he could not do the work alone, and that the departure of the union members involved the closing of the establishment. An effort is being made to bring this case before the Supreme Court, and in view of the importance of the question involved, and the equal division of opinion in the three Quebec Courts, it is to be hoped that the effort may be successful.

Since our Quebec Court of Appeal rendered judgment in *Gauthier & Perrault*, the New York Court of Appeals has decided the case of *Curran v. Galen*, in which the question was similar. The New York court has come to a different conclusion from that arrived at by the majority of our court. An article referring to the case, taken from the *New York Law Journal*, together with a report of the judgment, will be found in the present issue.

Jurors are no longer deprived of food and fire while deliberating on their verdict, but a judge in Chicago has gone further and set an evil precedent by ordering the bailiffs, in a recent case, to provide the jurors with a drink of intoxicating liquor at each meal. It is possible that this indulgence might do no harm in the case of those jurors who are accustomed to a beverage of this kind with their meals. But it is intrusting too much to the discretion of the officers of the court, and the practice might easily degenerate into a serious abuse. The W. C. T. U. of Chicago has made a formal protest against the innovation, and it will be generally conceded that the objection is a reasonable one. The time spent in deliberation is not usually so protracted that much inconvenience can be suffered from the temporary deprivation in any case, and jurors should not be encouraged in any practice which may have the effect of lessening their sense of the serious nature of the duty imposed on them.

Lord Chief Justice Russell seems to have rather astonished the legal mind in London, by voluntarily assuming duty which he had a plausible reason for ignoring. When holding the assizes at Newcastle his Lordship finished the civil work in three days, though five were allowed. Then the county of Durham provided enough work to keep both the judges occupied for the full time; but at York there were only two causes and seven criminal cases. Lord Russell disposed of the latter in one day, and at once returned to London, where he unexpectedly appeared in court on the Monday, and tried cases from the lists of the other judges of the Queen's Bench Division.

In referring to the case of *Plummer v. Gillespie*, *ante*, p. 66, the statement should have read that the judgment was affirmed by the Court of Review, instead of by the Court of Appeal.

SUPREME COURT OF CANADA.

OTTAWA, 20 February, 1897.

Nova Scotia.]

MACKENZIE v. MACKENZIE.

Title to land—Beneficial interest—Parties “in pari delicto.”

In 1875 G. M. entered into an agreement with the owner to purchase two lots of land in Halifax and entered into possession, and commenced to build a house on one of said lots. In 1877 he was called upon to carry out his agreement and pay the purchase money, the house not being completed, but sufficiently so to enable him to occupy it. At that time G. M. had become financially embarrassed and could not make the payment. He applied to a building society for a loan, but as there were judgments recorded against him which would have priority, he caused the deed to be executed in the name of W. M., his nephew, and then procured the loan. W. M. afterwards took possession of the property, and an action was brought against him by G. M. to compel him to execute a conveyance and for an account of rents and profits. The trial judge held that the deed was taken in the nephew's name to hinder, delay and defraud creditors, and refused the relief asked for. The court *en banc* reversed this judgment and ordered W. M. to convey the property to G. M.

Held, affirming the decision of the Supreme Court of Nova Scotia, that it did not appear from the evidence that G. M. in having the deed made in the name of his nephew had the intent of defrauding his creditors, who were not prejudiced and have not complained; that the parties were not *in pari delicto*, and G. M. was entitled to relief as the more excusable of the two.

Appeal dismissed with costs.

Whitman, for the appellant.*Silver*, for the respondent.

10 March, 1897.

Ontario.]

CANADIAN COLOURED COTTON MILLS CO. v. TALBOT.

Negligence—Employer and employee—Accident—Proximate cause—Evidence for jury.

T. was employed as a weaver in a cotton mill and was injured, while assisting a less experienced hand, by the shuttle flying out of the loom at which the latter worked, and striking her on the

head. The mill contained some 400 looms, and for every forty-six, there was a man, called the "loom fixer," whose duty it was to keep them in proper repair. The evidence showed that the accident was caused by a bolt breaking by the shuttle coming against it, and as this bolt served as a guard to the shuttle, the latter could not remain in the loom. The jury found that the breaking of the bolt caused the accident, and that the "loom fixer" was guilty of negligence in not having examined it within a reasonable time before it broke. T. obtained a verdict, which was affirmed by the Court of Appeal.

Held, Gwynne, J., dissenting, that the loom fixer had not performed his duty properly; that the evidence as to negligence could not have been withdrawn from the jury; and that though the mill was well equipped, as the jury had found the accident due to negligence, there being evidence to justify such finding, the verdict should stand.

Held, per Gwynne, J., that the finding of the jury that the negligence consisted in the omission to examine the bolt was not satisfactory, as there was nothing to show that such examination could have prevented the accident, and there should be a new trial.

Appeal dismissed with costs.

Martin, Q.C., for the appellants.

Tate, for the respondent.

26 February, 1897.

Quebec.]

DEMERS v. BANK OF MONTREAL.

Appeal—Commercial case—Trial by jury—Refusal of—Interlocutory matter.

By arts. 448, 449 and 450 C.C.P., trial by jury may be had in actions on debts, promises and agreements of a mercantile nature at the option of either party. In this case the trial judge held that the action was not mercantile and refused a jury, and his decision was affirmed by the Court of Queen's Bench. On motion to quash an appeal to the Supreme Court,

Held, that the judgment of the Queen's Bench was interlocutory only, and the appeal did not lie.

Appeal quashed with costs.

Fitzpatrick, Q.C., *Sol.-Gen. of Canada*, and *Ferguson*, Q.C., for the motion.

Lane, contra.

THE LEGAL NEWS.
CHANCERY DIVISION.

LONDON, 25 February, 1897.

In re THE MAGNOLIA COMPANY'S TRADE-MARKS. *Ex parte* THE
ATLAS METAL COMPANY (32 L.J.).

*Trade-mark—Name both botanical and geographical—Descriptive of
character of goods.*

This was a motion to expunge the word "Magnolia" from the Register of Trade-marks on the grounds (1) that the word was a geographical name, and (2) that it had reference to the character or quality of the goods.

The word was registered in June, 1894, for certain goods in class 5—namely, unwrought and partly wrought metals used in manufacture. It was not claimed as having been in use before August 13, 1875.

It appeared that Magnolia is the name of upwards of twenty towns and places in the United States of America, where the tree or shrub of that name grows in great profusion. It also appeared that the term was applied to a particular alloy made by the owners of the trade-mark, and was descriptive of that kind of alloy, which was known as "Magnolia Metal" before the date of the registration.

KEKEWICH, J., held that the name was botanical rather than geographical, and that therefore the trade-mark was not bad on the first ground, but that it was bad on the second ground, as the word, under the circumstances, had reference to the character of the goods, and made an order to rectify the register accordingly.

CHANCERY DIVISION.

LONDON, 5 March, 1897.

Before ROMER, J.

BROOKS V. THE RELIGIOUS TRACT SOCIETY (32 L.J.)

Copyright—Picture—Infringement.

The plaintiff owned the copyright in a picture and engraving entitled "Can You Talk?" of which a little child and a collie dog formed the central group and motive, the title being presumably suggested in part by the juxtaposition of and in part by the contrast between the pair of sentient beings of whom one only was .

gifted with speech. The defendants owned a periodical in which appeared, as an illustration to the letterpress, a woodcut, depicting a collie dog in attitude and expression similar to the one in "Can You Talk?"—namely, seated, and looking downward with, as the Court said, a sagacious expression in his face; only whereas in the picture he was contemplating the child, in the woodcut the place of the child was occupied by a tortoise, around which were grouped other domestic animals with looks either of astonishment or of alarm. The woodcut was entitled "A Strange Visitor." The plaintiff claimed to restrain the sale of the woodcut as an infringement of his copyright.

The defendants' counsel argued that the substitution of the tortoise for the child made the incident depicted in the woodcut meaningless as a presentment of the idea of the picture, which required for its point the contrast between the human and the dumb animal. It would therefore interfere neither with the reputation of the artist of "Can You Talk?" nor with the commercial value of his work, which it was the object of copyright law to protect—see *Hanfstaengl v. The Empire Palace*, 63 Law J. Rep. Chanc. 681; L. R. (1894) 3 Chanc. 109, *per Lopes*, L.J.

ROMER, J., held that infringement had taken place. The dog—a principal figure in the picture—had been copied, and besides that the artistic feeling and character of the work had been taken. In substance the plaintiff's design had been followed, with the substitution of other animals for the child. Where a substantial part of a picture was taken, *qua* picture, then there was infringement; as, for instance, if from an historical picture the principal figure were reproduced, although alone. An injunction was accordingly granted.

NEW YORK COURT OF APPEALS.

2 March, 1897.

CURRAN, respondent, v. GALEN *et al.*, appellants.

Public policy—Procuring discharge of plaintiff from employment—Arrangement between organization of workingmen and association of employers to coerce workingmen to become members of organization.

Public policy and the interest of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper or to restrict that freedom,

and through contracts or arrangements with employers to coerce other workmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their positions and of deprivation of employment, their purpose is unlawful.

Plaintiff, who had been discharged from employment by a brewing company, brought an action against the defendants for conspiring and confederating together to procure his discharge and prevent him from obtaining employment. The defendants in their answer alleged as a defence that they were members of a Workingman's Assembly, Knights of Labor, which had an agreement with the Brewers' Association, composed of the brewing companies, that all their employees should be members of the assembly, and that no employee should work for a longer period than four weeks without becoming such member; that what the defendants did in obtaining the plaintiff's discharge was as members of the assembly, and in pursuance of this agreement, upon his refusing to become a member. Plaintiff demurred to this defence. Held, that the defence was insufficient in law, and that the demurrer should be sustained.

The plaintiff demands damages against the defendants for having confederated and conspired together to injure him by taking away his means of earning a livelihood and preventing him from obtaining employment. He sets out in his complaint that he was an engineer by trade, and that, previously to the acts mentioned, he was earning, by reason of his trade, a large income, and had constant employment at remunerative wages. He sets forth the existence of an unincorporated association in the city of Rochester, where he was a resident, called the Brewery Workingmen's Local Assembly, 1795, Knights of Labor, which was composed of workmen employed in the brewing business in that city, and was a branch of a national organization known as the Knights of Labor. He alleges that it assumed to control by its rules and regulations the acts of its members in relation to that trade and employment, and demands and obtains from its members implicit obedience in relation thereto.

Plaintiff then alleges in his complaint that the defendants Grossberger and Watts wrongfully and maliciously conspired and combined together, and with the said local assembly, for the purpose of injuring him and taking away his means of earning a livelihood, in the following manner, to wit:

That in the month of November, 1890, Grossberger and Watts threatened the plaintiff that unless he would join said local assembly, pay the initiation fee and subject himself to its rules and regulations, they and that association would obtain plaintiff's

discharge from the employment in which he then was and make it impossible for him to obtain any employment in the city of Rochester, or elsewhere, unless he became a member of said association. In pursuance of that conspiracy, upon plaintiff refusing to become a member of said association, Grossberger and Watts and the association made complaint to the plaintiff's employers and forced them to discharge him from their employ, and by false and malicious reports in regard to him sought to bring him into ill-repute with members of his trade and employers and to prevent him from prosecuting his trade and earning a livelihood. The answer, in the first place, admitted all that was alleged in respect to the organization of the local assembly, as to how it was composed and as to its being a branch of the national organization of the Knights of Labor, and as to its assuming to control the acts of its members and to demand from them implicit obedience. It then denies, generally and specifically, each and every other allegation in the complaint.

As a second and separate answer and defence to the complaint, the defendants set up the existence in the City of Rochester of the Ale Brewers' Association, and an agreement between that association and the local assembly described in the complaint, to the effect that all employees of the brewery companies belonging to the Ale Brewers' Association "shall be members of Brewery Workingmen's Local Assembly, 1796, Knights of Labor, and that no employee should work for a longer period than four weeks without becoming a member." They alleged that the plaintiff was retained in the employment of the Miller Brewing Company "for more than four weeks after he was notified of the provisions of said agreement, requiring him to become a member of the local assembly," that defendants requested plaintiff to become a member, and upon his refusal to comply, "Grossberger and Watts, as members of said assembly, and as a committee duly appointed for that purpose, notified the officers of the Miller Brewing Company that plaintiff, after repeated requests, had refused more than four weeks to become a member of said assembly," and that "defendants did so solely in pursuance of said agreement, and in accordance with the terms thereof, and without intent or purpose to injure plaintiff in any way." The plaintiff demurred to the matter set up as a separate defence to

the complaint, upon the ground that it was insufficient in law upon the face thereof. The Special Term and General Term have sustained the demurrer, and the question is whether this matter, set up by way of special defence, is sufficient to exonerate the defendants from the charge made in the complaint of a conspiracy to injure the plaintiff and to deprive him of the means of earning his livelihood.

PER CURIAM.—In the decision of the question before us we have to consider whether the agreement upon which the defendants rely in defence of this action, and to justify their part in the dismissal of the plaintiff from his employment, was one which the law will regard with favor and uphold, when compliance with its requirements is made a test of the individual's right to be employed. If such an agreement is lawful, then it must be conceded that the defendants are entitled to set it up as a defence to the action, forasmuch as they alleged that what they did was in accordance with its terms.

In the general consideration of the subject, it must be premised that the organization, or the co-operation of workingmen, is not against any public policy. Indeed, it must be regarded as having the sanction of law when it is for such legitimate purposes as that of obtaining an advance in the rate of wages or compensation, or of maintaining such rate (Penal Code, Sec. 170).

It is proper and praiseworthy, and, perhaps, falls within that general view of human society which perceives an underlying law that men should unite to achieve that which each by himself cannot achieve, or can achieve less readily. But the social principle which justifies such organizations is departed from when they are so extended in their operations as either to intend or to accomplish injury to others. Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper, or to restrict, that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization, and to come under its rules and conditions, under the penalty of the loss of their positions, and of deprivation of employment, then that purpose seems clearly unlawful, and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with

that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in useful employments and capacities. It would, to use the language of Mr. Justice Barrett in *People ex rel. Gill v. Smith*, 5 N. Y. Cr. Rep. at p. 513, "impoverish and crush a citizen for no reason connected in the slightest degree with the advancement of wages or the maintenance of the rate."

Every citizen is deeply interested in the strict maintenance of the constitutional right freely to pursue a lawful avocation, under conditions equal as to all, and to enjoy the fruits of his labor, without the imposition of any conditions not required for the general welfare of the community. The candid mind should shrink from the results of the operation of the principle contended for here: for there would certainly be a compulsion, or a fettering, of the individual, glaringly at variance with that freedom in the pursuit of happiness which is believed to be guaranteed to all by the provisions of the fundamental law of the State. The sympathies, or the fellow-feeling which, as a social principle, underlies the association of workmen for their common benefit, are not consistent with a purpose to oppress the individual who prefers by single effort to gain his livelihood. If organization of workmen is in line with good government, it is because it is intended as a legitimate instrumentality to promote the common good of its members. If it militates against the general public interest, if its powers are directed toward the repression of individual freedom, upon what principle shall it be justified? In *Regina v. Rolands* (17 Ad. & Ellis [N.S.], *689) the question involved was of the right by combination to prevent certain workmen from working for their employers, and thereby to compel the latter to make an alteration in the mode of conducting their business.

The Court of Queen's Bench, upon a motion for a new trial for misdirection of the jury by Mr. Justice Erle below, approved his charge, and we quote from his remarks. He instructed the jury that "a combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured, and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another. The rights of workmen are conceded;

but the exercise of free will and freedom of action, within the limits of the law, is also secured equally to the masters. The intention of the law is, at present, to allow either of them to follow the dictates of their own will, with respect to their own actions, and their own property, and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage."

The organization of the local assembly in question by the workmen in the breweries of the city of Rochester may have been perfectly lawful in its general purposes and methods, and may otherwise wield its power and influence usefully and justly, for all that appears.

It is not for us to say, nor do we intend to intimate, to the contrary; but so far as a purpose appears from the defence set up to the complaint that no employee of a brewery company shall be allowed to work for a longer period than four weeks, without becoming a member of the Workmen's Local Assembly, and that a contract between the local assembly and the Ale Brewers' Association shall be availed of to compel the discharge of the independent employee, it is, in effect, a threat to keep persons from working at the particular trade, and to procure their dismissal from employment. While it may be true, as argued, that the contract was entered into on the part of the Ale Brewers' Association with the object of avoiding disputes and conflicts with the workmen's organization, that feature and such an intention cannot aid the defence, nor legalize a plan of compelling workmen, not in affiliation with the organization, to join it, at the peril of being deprived of their employment and of the means of making a livelihood.

In our judgment, the defence pleaded was insufficient, in law, upon the face thereof, and, therefore, the demurrer thereto was properly sustained.

The judgment appealed from should be affirmed, with costs.

All concur, except Haight, J., not sitting.

COERCION THROUGH PROCURING DISCHARGE FROM EMPLOYMENT.

We believe that the quite decided weight of opinion, in the profession and outside of it, has approved of the decision of the Supreme Court of Massachusetts in *Vegelahn v. Guntner*, 44

N.E.R. 1077. It was therein held that the maintenance of a patrol of two men in front of plaintiff's premises, in furtherance of a conspiracy to prevent, whether by threats and intimidation or by persuasion and social pressure, any workman from entering into, or continuing in his employment, would be enjoined.

There has, however, been some adverse comment upon that decision in periodicals of excellent standing. The theory of hostile criticism, as stated in the dissenting opinion of Judge Holmes and amplified by editorial comment, is that a controversy of the kind involved was outside of the legitimate purview of the law courts; that such controversy represented one phase of a great industrial evolution, or revolution, now in progress; and that it was the duty of the courts to keep hands off when novel questions arose, in order that economic and social forces might adjust themselves. While the courts, of course, should not officiously interpose in matters of individual or confederate concern, in our judgment it would be shirking an essential function of tribunals of justice to decline jurisdiction in labor controversies simply because novel phases of fact arise.

It is in the highest degree important that the courts protect fundamental rights and impartially enforce them as to all parties and classes. The courts have, therefore, quite unanimously condemned boycotts of many and various kinds, because they tend to do away with freedom of competition and personal liberty and security in general. Attempts by one person or an organization of persons to coerce another person, by affecting his standing or relations with a third person, are held unlawful. If the boycott principle were countenanced by the courts and permitted to grow into a regular rule of procedure, there could be no safety for individual liberty of conduct and contract against the despotism of industrial associations and cliques.

The decision of the New York Court of Appeals in *Curran v. Galen* (N.Y.L.J., March 9, 1897), is very consistently in line with the Massachusetts case above referred to, and the general judicial attitude toward industrial controversies. It appeared that plaintiff, who had been discharged from employment by a brewing company, brought an action for damages against the defendants for conspiring and confederating together to procure his discharge and prevent him from obtaining employment. The defendants in their answer alleged as a defence that they were

members of a Workingman's Assembly, Knights of Labor, which had an agreement with a Brewing Association, composed of the brewing companies, that all their employees should be members of the assembly, and that no employee should work for a longer period than four weeks without becoming a member; that what the defendants did in obtaining the plaintiff's discharge was as members of the assembly and in pursuance of this agreement, upon his refusing to become a member.

Plaintiff demurred to this defence, and it was held that the same was insufficient in law, and that the demurrer should be sustained. The Massachusetts case above referred to concerned a controversy between an employer and employees. The New York case affects the right of an employee himself as against a Workingman's Assembly; but the same fundamental principle underlies both decisions. The following language from the opinion of the New York Court of Appeals felicitously presents the claim of individual liberty, which, as above intimated, everything in the nature of a boycott tends to subvert:

"Every citizen is deeply interested in the strict maintenance of the constitutional right freely to pursue a lawful avocation, under conditions equal as to all, and to enjoy the fruits of his labor, without the imposition of any conditions not required for the general welfare of the community.

"The candid mind should shrink from the results of the operation of the principle contended for here; for there would certainly be a compulsion, or a fettering, of the individual, glaringly at variance with that freedom in the pursuit of happiness which is believed to be guaranteed to all by the provisions of the fundamental law of the State. The sympathies, or the fellow feeling which, as a social principle, underlies the association of workingmen for their common benefit, are not consistent with a purpose to oppress the individual who prefers by single effort to gain his livelihood. If organization of workingmen is in line with good government, it is because it is intended as a legitimate instrumentality to promote the common good of its members. If it militates against the general public interest, if its powers are directed toward the repression of individual freedom, upon what principle shall it be justified?"—*N. Y. Law Journal*.

PACIFIC BLOCKADE.

The legality of instituting a blockade in time of peace as a measure of restraint short of war has been frequently questioned, but the precedents tend to show that it is legal, subject to the important qualification that it should only be applied against the vessels of the offending nation, and not against those of third nations (Lord Granville to M. Waddington on the Formosa blockade, 1884; and the Greek blockade, 1886). Hall (3rd edit., p. 372) says of the measure: "Pacific blockade, like every other practice, may be abused. But, subject to the limitation that it shall be felt only by the blockaded country, it is a convenient practice; it is a mild one in its effects even upon that country, and it may sometimes be of use as a measure of international police, when hostile action would be inappropriate and no action less stringent would be effective." It has proved specially advantageous against weak States. The moral sentiment of civilized nations may be relied upon to prevent its abuse by any one nation; while a still more effective check exists in the fact that the measure is usually put in force by the joint action of several nations rather than by one nation alone.

Greece holds a prominent position in relation to pacific blockade as a means for the settlement of international difficulties, and it appears probable that unless she complies with the demands of the Powers with reference to Crete she may afford another illustration of its application. The first occasion upon which blockade was applied otherwise than between nations at war with one another was in 1827, when the coasts of Greece, which were occupied by Turkish forces, were blockaded by the squadrons of Great Britain, France, and Russia, with the view of coercing Turkey, with whom the blockading nations professed to be at the time still at peace. Again, in 1850, when Greece refused to compensate a British subject for injury to property done by Greek subjects, the Greek ports were blockaded by England, with the somewhat insignificant eventual result that a claim of more than 21,000*l.* was settled by a payment of 150*l.* Thirdly, in order to compel her to abstain from making war upon Turkey, Greece was in 1886 blockaded by the fleets of Great Britain, Austria, Germany, Italy, and Russia, with the result that within little more than a fortnight from the notification and enforcement of the blockade the King of Greece signed a decree to disarm.—*Law Journal (London).*

INSTRUCTION TO LAND BUYERS.—Lines over 300 years old, copied from the roll in the Manor Court office, Wakefield, England.

First see the land which thou intend'st to buy
 Within the seller's title clearly lye,
 And that no woman to it doth lay claime
 By dowry, joynture, or some other name
 That may incumber. Know if bond or fee
 The tenure stand, and that from each feoffee
 It be released, that th' seller be soe old
 That he may lawful sell, thou lawful hold.
 Have special care that it not mortgag'd lye,
 Nor be entailed upon posterity.
 Then if it stand in statute bound'or noe,
 Be well advised what quitt rent out must goe,
 What custome service hath been done of old
 By those who formerly the same did hold.
 And if a wedded woman put to sale
 Deal not with her unless she bring her male,
 For she doth under covert barren goe,
 Although sometimes some traffique soe (we know).
 Thy bargain made and all this done,
 Have special care to make thy charter run
 To thee, thy heirs, executors, assigns,
 For that beyond thy life securely binds.
 These things foreknown and done, you may prevent
 Those things rash buyers many times repent;
 And yet when you have done all you can,
 If youle be sure, deal with an honest man.

SENDING MARKED COPIES TO A JUDGE.—In a recent political case heard before a Harrisburg (Pa.) court, the judges took occasion to most severely arraign certain newspapers for criticising the action of the court in preliminary proceedings. The court claimed that the papers in question attempted to influence its action in the case by mailing to the judges marked copies of their newspapers, and that such an act was equivalent to that of a person seeking to influence the decision of a judge by solicitation or threats. The court says that the only difference is that the papers have not the courage a man would show in coming in person to a judge, for in that case a judge could spurn him from his presence, but, in that of the papers, "we can only express our indignation and contempt both for the matter and the manner of their violation of the principles which should govern decent and honest journalism."

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SUPREME COURT OF CANADA.

OTTAWA, 24 March, 1897.

Quebec]

BEAUHARNOIS ELECTION CASE.

BERGERON v. DESPAROIS.

*Controverted election—Preliminary objections—Service of petition—
Bailiff's return—Cross-examination—Production of documents.*

A preliminary objection filed to an election petition was that it had not been properly served. The bailiff's return was that he had served it by leaving a copy "duly certified" with the sitting member. By Art. 56, C.C.P., a writ or other document is served by giving a copy to the person on whom service is to be effected, certified by the prothonotary, attorney or sheriff, and it was claimed that the return in this case should have shown by whom the copy was certified. On the hearing the counsel for the sitting member wished to cross-examine the bailiff as to the contents of the copy, but without producing it, but was not allowed to do so.

Held, that the bailiff's return was good. Art. 78 C. C. P. only requires a return that he had served a copy, and the words "duly certified" were superfluous.

Held also, that counsel could not cross-examine the bailiff as to the contents of the copy served, without producing it or laying a foundation for secondary evidence.

Appeal dismissed with costs.

Foran, Q.C., and *Ferguson, Q.C.*, for appellant.

Choquet, for respondent.

24 March, 1897.

Nova Scotia.]

LUNENBURG ELECTION CASE.

KAULBACH v. SPERRY.

*Election petition—Preliminary objections—Affidavit of petitioner—
Bona fides—Examination of deponent—Form of petition—R.S.
C., c. 9—54 & 55 Vic., c. 20, s. 3.*

By 54 & 55 V., c. 20, s. 3, amending The Controverted Elections Act (R.S.C., s. 9), an election petition must be accompanied by an affidavit of the petitioner "that he has good reason to believe and verily does believe that the several allegations contained in the said petition are true." The petitioner in this case used the exact words of the act in his affidavit.

Held, that the respondent to the petition was not entitled to examine him as to the grounds of his belief; that the act made the deponent the judge of the reasonableness of such grounds; and that the affidavit was not part of the proof to be passed upon at the trial of the petition.

It is not necessary that the petition should be identified in the affidavit as in case of an exhibit. The affidavit is presented merely to comply with the statute.

It is no objection to an election petition that it is too general, no form being prescribed by the act. Moreover, the inconvenience may be obviated by particulars.

W. A. B. Ritchie, Q.C., for appellant.

Russell, Q.C., and *Congdon*, for respondent.

24 March, 1897.

Prince Edward Island.]

WEST PRINCE (P.E.I.) ELECTION CASE.

HACKETT v. LARKIN.

Controverted election—Corrupt treating—Agency—Trivial and unimportant act—54 & 56 Vic., c. 20, s. 19.

During an election for the House of Commons a candidate took C., a supporter, with him in driving out to canvass a particular locality. They stopped at a house where three voters lived, and C. took a bottle of liquor out of the wagon and went into the woods with two of the voters and remained some five

minutes, afterwards taking the third voter into his barn where he gave him two or three drinks out of the bottle and urged him to vote for the candidate with him. It did not appear that the latter saw C. take out the bottle or knew it was in the wagon. The candidate having been elected a petition was filed against his return, and he was unseated on the charge of corrupt treating by C., and acquitted on all other charges.

Held, that the act of C., in giving liquor to the voter in the barn and urging him to support his candidate was corrupt treating under the Elections Act.

C. was a member of a political association for a place within the electoral district supporting the candidate elected. There was no restriction on the members of the association to be confined in their work to the limits of the place for which it was formed, and the candidate admitted on the trial of the petition that he expected them to do the best they could for him generally.

Held, that the members were agents of their candidate throughout the whole district, and C. was therefore his agent.

Though the only act of corruption of which the sitting member was found guilty was trivial and unimportant in character, he was not entitled to the benefit of 54 & 55 V., c. 20, s. 19, as he had not used every means to secure a pure election. There were circumstances attending the commission of the corrupt act by C. which should have aroused his suspicions, and he should have cautioned C. against the commission of the act. Not having done so he had not brought himself within the terms of the above act.

Appeal dismissed with costs.

McCarthy, Q.C., and *Stewart, Q.C.*, for the appellant.

Peters, Q.C., Atty.-Gen. of P.E.I., for the respondent.

24 March, 1897.

Manitoba.]

MARQUETTE ELECTION CASE.

KING v. ROCHE.

Appeal—Preliminary objections—R. S. C., c. 9, ss. 12 and 50—Dismissal of petition—Affidavit of petitioner.

A petition under the Controverted Elections Act (R.S.C., c. 9) against the return of the respondent at the election for the

House of Commons on June 23rd, 1896, was served on July 30th, and in September the petitioner was examined under sec. 14 of the Act. Notice of motion was afterwards given to strike the petition off the files of the Court on the ground that the affidavit of the petitioner was false, it having appeared from his examination that he had no knowledge of the truth or otherwise of the matters sworn to in the affidavit. The judge who heard the motion dismissed it, holding that the matter should have come up on preliminary objections filed under sec. 12 of the Act. His judgment was reversed by the full Court and the petition struck off.

Held, that the Court had no jurisdiction to entertain an appeal from this decision. That an appeal only lies from a decision on a preliminary objection (sec. 50), and that means a preliminary objection filed, under sec. 12, within five days from the date of service of the petition.

Appeal quashed with costs.

Howell, Q. C., and *Chrysler, Q. C.*, for the appellant.

Tupper, Q. C., for the respondent.

24 March, 1897.

Manitoba.]

WINNIPEG ELECTION CASE.

MACDONALD v. DAVIS.

MACDONALD ELECTION CASE.

BOYD v. SNYDER.

Election petition—Service—Copy—Status of petitioner—Preliminary objections.

On the hearing of preliminary objections to an election petition to prove the status of the petitioner, a list of voters was offered with a certificate of the Clerk of the Crown in Chancery, which, after stating that said list was a true copy of that finally revised for the district, proceeded as follows:

"And is also a true copy of the list of voters which was used at said polling division at and in relation to an election of a member of the House of Commons of Canada for the said electoral district, which original list of voters was returned to me by the returning officer for said electoral district in the same plight and condition as it now appears, and said original list of voters is now on record in my office."

Held, that this was, in effect, a certificate that the list offered in evidence was a true copy of a paper returned to the Clerk of the Crown by the returning officer as the very list used by the deputy returning officer at the polling district in question, and that such list remained of record in possession of said Clerk. It was then a sufficient certificate of the paper offered being a true copy of the list actually used at the election. *Richelieu Election Case* (21 Can. S. C. R. 168) followed.

Appeals dismissed with costs.

Tupper, Q.C., for the appellants.

Howell, Q.C., and *Chrysler, Q.C.*, for the respondents.

24 March, 1897.

North West Territories.]

WEST ASSINIBOIA ELECTION CASE.

DAVIN v. McDougall.

Appeal—Preliminary objections—Delay in filing—Order in Chambers—R. S. C. c. 9, ss. 12 and 50.

By the Controverted Elections Act, R.S.C., c. 9, s. 12, preliminary objections to an election petition must be filed within five days from the service of the petition, and by sec. 50 an appeal can be taken to the Supreme Court from a judgment, rule, order or decision on such objections the allowance of which has, or which if allowed would have, put an end to the petition.

Preliminary objections were filed with the Clerk of the Court at 2.30 p.m. on the fifth day after the petition was served. By Jud. Order No. 6 of 1893, sec. 17, subsec. 1, the office of the Clerk is to be closed at 1 p.m. during the summer vacation comprising July and August. Mr. Justice Richardson in Chambers, on return of a summons calling upon the member elect to show cause why the objections should not be struck out or otherwise disposed of, held that the five days expired at 1 p.m. on August 3rd, and that the objections were not properly filed.

Held, that this decision was not one on preliminary objections, nor could any disposition of the matter put an end to the petition. Consequently no appeal would lie to the Supreme Court.

Appeal quashed with costs.

McIntyre, Q.C., for the appellant.

Howell, Q.C., and *Chrysler, Q.C.*, for the respondent.

COURT OF APPEAL.

LONDON, 12 March, 1897.

GRAHAM v. SUTTON, CARDEN & Co. (32 L.J.)

Practice—Discovery—Inspection of books—Covering up parts not material—Mode of.

Appeal from a decision of NORTH, J.

The plaintiff had obtained in the action an order for an account of the commissions due by the defendant company to him as their agent from the commencement of his agency in 1886; and he subsequently obtained an order for discovery. On November 30, 1896, an order was made for the production by the defendants of a large number of ledgers and other books for inspection by the plaintiff, his solicitors, and accountant; but the defendants were at liberty previously thereto to seal up such parts of the books as according to an affidavit to be made by one of their secretaries did not relate to the account.

The defendants alleged that their business would practically be stopped if these books were kept sealed during the whole period covered by the inspection; and they took out a summons asking that they might be at liberty on the inspection to cover up such parts of the books as did not contain entries relating to the account, and also to use certain of the books which had been sealed up in their business during the inspection, and for that purpose, if necessary, to unseal the sealed parts. North, J., made no order, except that the defendants might unseal and reseal on oath from time to time as the books might be required for their business such parts as did not relate to the account.

The defendants appealed.

Their Lordships (Lindley, L.J., Smith, L.J., Rigby, L.J.,) said that, though the order of November 30, 1896, might be in the common form, to enforce a literal compliance with it in this case would be oppressive; and though North, J., had given some relaxation, it was still more vexatious than was necessary for the purposes of justice. They discharged the order of North, J., and made an order giving the defendants leave on the inspection to cover up from time to time such parts of the books as did not contain entries relating to the account, and to produce for inspection such entries only as related to the matters in question,

without on each occasion sealing up the irrelevant entries, their secretary upon an inspection stating on oath that no parts of the books that were material had been covered up during it.

QUEEN'S BENCH DIVISION.

LONDON, 13 March, 1897.

HAWKE (appellant) v. DUNN (respondent).—32 L.J.

*Gaming—"Place" used for purpose of betting—Betting Act, 1853
(16 & 17 Vict., c. 119), ss. 1, 3.*

Case stated by justices.

An information was preferred by the appellant under section 3 of the Betting Act, 1853, against the respondent for unlawfully using a certain place—to wit, an inclosure known as the 1^l. or Tattersall's Ring—for the purpose of betting with persons resorting thereto upon certain events and contingencies of and relating to horse-racing.

By section 1 of the Act, "No house, office, room, or other place shall be opened, kept, or used for the purpose of.....any person using the same.....betting with persons resorting thereto."

By section 3, "Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall.....use the same for the purposes hereinbefore mentioned, or either of them," is made liable to a penalty.

Tattersall's Ring is inclosed by a fence or paling about breast high, and is about forty yards long by thirty yards wide, and capable of containing more than 1,000 persons. Upon the occasion of a race meeting the respondent, a professional book-maker, was with about 1,000 other persons present in Tattersall's Ring. He shouted the odds and made bets with every person who would bet with him. He did not confine himself to any fixed spot, and had no stool, umbrella, or anything in the nature of a fixture to denote where he carried on betting, but moved about.

The justices being of opinion that the respondent could not be convicted unless he had a certain fixed place from which he never moved, such as a stool or umbrella, dismissed the information.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

The Court (Hawkins, J., Cave, J., Wills, J., Wright, J., and Kennedy, J.) held that the inclosure was a "place" within the meaning of the statute. One object the Legislature had in view was the suppression of that kind of gaming which took place in this case. To have passed an Act simply to suppress this kind of gaming in houses or offices would have been useless. It would be frittering away the statute to hold that a well-known defined inclosure bearing a name could not be called a place unless the respondent stood still. It was true that there was a rule that general words in a statute should be read as *ejusdem generis* with particular words preceding them; but that rule must be applied subject to the equally general rule that a statute ought to be construed so as to carry out its object.

Case remitted to the magistrates.

QUEEN'S BENCH DIVISION.

LONDON, 13 March, 1897.

GOLDSTEIN (appellant) v. VAUGHAN (respondent).—32 L.J.

Sunday—Closing workshops—Exception in favour of Jews—Factory and Workshop Act, 1878 (41 Vict. c. 16), s. 51—Construction—"Open for traffic" on Sunday.

Case stated by a metropolitan police magistrate before whom the appellant had been convicted upon an information laid by the respondent, an inspector of factories, charging that his workshop was open for traffic on Sunday.

The appellant's business was to make buttonholes for master tailors. He was of the Jewish religion, and having his workshop closed on Saturday, had availed himself of the exception within sections 50 and 51 of the Factory and Workshop Act, 1878, which entitled him to employ women and young persons on Sunday. His mode of doing business was as follows: He entered into arrangements with his customers to make buttonholes at certain prices. They sent the garments to the workshop and fetched them away. The buttonholes were not paid for when the work was left, nor when taken away, but accounts were kept and settlements arrived at, at times independent of these visits. The workshop was open on Sunday so that customers might send and fetch away garments in pursuance of

such prior arrangements; but it was not kept open for the purpose of making an arrangement with either an old or new customer; nor for the receipt of work from a casual customer. On Sunday, September 20, 1896, the appellant employed in his workshop a woman of the Jewish religion. Section 51 provides that "no penalty shall be incurred by any person in respect of any work done on Sunday in a workshop or factory by a young person or woman of the Jewish religion subject to the following conditions:.....(2) The factory or workshop shall be closed on Saturday and shall not be open for traffic on Sunday....." The learned magistrate thought that the facts brought the case within the words "open for traffic on Sunday," and convicted the appellant. The question for the Court was whether the facts brought the appellant's workshop within the words "open for traffic on Sunday."

The Court (Cave, J., and Grantham, J.) held that although it was not altogether easy to construe the word "traffic," yet the learned magistrate had upon the facts taken a somewhat too narrow view. They were of opinion, seeing that the work was brought in pursuance of arrangements made on previous days, that the appellant's workshop was not open for traffic.

Conviction quashed.

MEASURE OF DAMAGES IN CASES OF INABILITY TO CONVEY GOOD TITLE TO LAND.

That the decisions on this subject are irreconcilable is not surprising when one considers the diversity of opinion as to the ground upon which the distinction made in this regard between the case of a vendor's breach of a contract for the sale of realty and the like breach of a contract for the sale of chattels, rests.

In *Drake v. Baker* (34 N. J. L. 358), the New Jersey Supreme Court held, that where one agrees to sell real estate and subsequently discovers that his title is defective, and is on that account unable to complete his bargain, nominal damages only can be recovered against him, but limited the scope of the rule to the case of a vendor unable to perform by reason of a defect in his title, which was unknown to him when he entered into the contract. In *Gerbert v. Congregation of the Sons of Abraham* (35 Atl. Rep. 1121), the Court of Errors and Appeals overrules this case and, following *Bain v. Fothergill* (L. R. 7 H. L. 158), holds

that the rule restricting the recovery to nominal damages applies to every case where the vendor fails to convey through inability to make title; and that the rule is the same, whether the vendor has been guilty of fraud or not.

In several of the States a rule exactly the reverse of that adopted in New Jersey prevails. In these States the vendor's good or bad faith is treated as irrelevant to the question of the damages to be awarded, and in either case a recovery of substantial damages is allowed. (Maupin's Marketable Titles to Real Estate, 213.)

The doctrine which finds general favor in this country seems to be that which prevails in New York. By this, while a vendor contracting to sell in good faith, believing he has a good title, and afterwards discovering his title to be defective, for that reason, without any fraud on his part, refuses to fulfil his contract, is held liable to nominal damages only (*Conger v. Weaver*, 20 N. Y. 140; *Cockraft v. The N. Y. & H. R. R. Co.*, 69 N. Y. 201), yet, where he is chargeable with wrongful conduct, as where he fraudulently misrepresents or conceals the state of his title, or covenants to convey when he knows he is without authority to do so, even though he acts in good faith, believing that he will be able to procure a good title for the purchaser, he is held liable for the loss of the bargain. (*Pumpelly v. Phelps*, 40 N. Y. 59.) In this latter instance, however, if the purchaser knew, at the time he entered into the contract, that the ability of the vendor to convey good title depended upon a contingency, his recovery is limited to nominal damages, for under such circumstances the vendor can scarcely be said to have been guilty of wrong doing. (*Magraff v. Muir*, 57 N. Y. 155).

For a discussion of the reasons advanced for and against each of these rules, see Maupin on Marketable Titles to Real Estate, sec. 90, etc.; 3 Sedg. on Dam. 196; Sedg. El. of Dam. 320.—*University Law Review*.

COLONIAL JUDGES IN ENGLAND.—Sir H. De Villiers, Chief Justice of the Cape Colony, is expected in London in April. The chief object of his visit is to take the oath as a Privy Councillor and his seat on the Judicial Committee. Sir Henry Strong, Chief Justice of the Supreme Court of Canada, is also expected to visit England shortly, for the same object.

PREVENTION OF THE PUBLICATION OF PORTRAITS OF PERSONS.

We believe that the measure introduced in the legislature by Senator Ellsworth, to prevent the publication of portraits or attempted portraits of individuals without their consent, aims at a very desirable reform, and that it is possible, though perhaps not very easy, to frame a workable law. The debate in the senate last week disclosed that the principal practical difficulty concerns the question of caricatures, not intended for portraits pure and simple, but to point a moral or graphically present an argument. As remarked in an editorial in the *Evening Post* of March 5th, such cartoons are "allowable by prescription." They have been used with striking effect as expedients of political agitation both in this country and England for many years. The services of Thomas Nast in the movement against the Tweed ring are still vividly remembered. And in later times, personal cartoons have undoubtedly materially influenced the results even of presidential elections. Sensible as we are of the great susceptibility to abuse of such method of appeal to the public, we do not believe that popular sentiment demands or could be brought to favor its absolute suppression. It must be remembered that a person so caricatured has a clear and substantial remedy by an ordinary suit for libel if he chooses to exercise it.

The case is different where a portrait, or an alleged or attempted portrait, of a person is inserted in a periodical or other print, not with any didactic or satirical purpose, but merely to present his physiognomy to the public. If the workmanship be inferior or slovenly, and the result be actually to hold the subject up to ridicule or contempt, it may be that a cause of action would lie and a substantial recovery could be had for libel. But broader than this consideration is the one that, whether the portrait be good or bad, the right of privacy is morally entitled to protection, and it is desirable to guard such right, by legislation permitting suit to be brought and recovery readily to be had for unauthorized publications, even of true likenesses. This, of course, would not prevent the insertion in papers of portraits of individuals in proper cases. Experience of human nature shows that there is little difficulty in inducing the average man to consent that the light of his countenance be permitted to beam upon his appreciative and admiring countrymen, whenever an

editor of decent standing suggests that the veil of privacy be withdrawn.

As a rule, in the better class of publications, the consent of the subject is procured, and a photograph obtained from him as a basis for the lithographer's or engraver's art. Legislation of the kind proposed would tend to exclude the exhibition of mortifying snap-shots by newspaper artists, and enable the individual to control the time and manner of the appearance of his likeness. Undoubtedly the right now exists to enjoin the publication of the portrait of a living person. The difficulty is that often the first notice of the intention to publish is the actual appearance of the picture. If a cause of action for damages exists after publication, the recovery could scarcely be more than nominal where there is no caricature, but the intent was to present a *bona fide* portrait.

If any remedy be attempted it should take the form of a definite penalty, suable for by the person aggrieved. It would make the law practically nugatory to simply pronounce its infractions misdemeanors punishable by fine and to be prosecuted by district attorneys. The centres of the offending are the large cities and towns, where public prosecutors have always so much work of serious importance on hand that it could not be hoped that such comparatively petty infractions of law would be faithfully followed up.

On the theory of protecting the right of privacy, therefore, the experiment seems worth trying of conferring the right to sue for a penalty for the publication of any pictorial representation of a person's face or form.

The objection may be raised that a double and concurrent remedy would thereby be granted for such pictures as are libellous. But as matter of fact, a large majority of caricatures and cartoons that are now printed are unquestionably libellous, and it is not probable that men in public life would be more apt to prosecute an action for a small penalty than they are to sue for heavy damages for defamation. And a new law as proposed would give persons wantonly dragged into publicity a means of redress, the exercise of which would tend to make the newspapers more careful and discriminating. The key to the situation is that it is the custom now to deliberately violate legal rights, the newspapers taking all risk. If a tangible means of redress existed in favor of everybody, such risk would be more cautiously run.—*New York Law Journal*.

THE LATE LORD JUSTICE KAY.

It is with regret that we record the death of Sir Edward Kay, which took place early on 9th March, at his London residence. He had suffered for two years from a serious internal malady, which, prior to his retirement from the Court of Appeal at the beginning of the present term, had compelled him to be absent for protracted periods. He underwent a second operation shortly before Christmas, and his indomitable courage and perseverance gave encouragement to the expectation that he would resume his duties as a Lord Justice; but it was eventually recognized that his strength would not be equal to the strain, and his resignation was accepted. Sir Edward Kay took so keen an interest in his judicial duties that he was most anxious to resume them. Almost up to the moment of his resignation he read the various reports with his accustomed diligence. But it must not be assumed that because he was attached to his duties in the Court of Appeal he displayed any undue inclination to cling to his office. His resignation was placed in the hands of the Lord Chancellor more than once before it was accepted. It was consistent with the conscientiousness he displayed in the hearing of cases that he should offer to retire from the Bench immediately his illness began seriously to interfere with his attendance to his duties. His career was laborious and meritorious in a high degree. His success was due entirely to his own exertions. He had no family influence to brighten his early days at the Bar, while his promotion to the Bench was solely in recognition of the professional eminence which his industry and ability had enabled him to acquire. The only occasion on which he stood for Parliament was in 1874, when he contested Clitheroe in the Liberal interest and was defeated. Determination was writ large on his long upper lip; his features were those of a man who had determined to succeed, and the look of austere dignity which settled upon them appeared to express his recognition of the fact that he had achieved his purpose. The fourth son of Mr. Robert Kay, of Bury, Lancashire, Edward Ebenezer Kay was born seventy four years ago. The late Sir J. Kay-Shuttleworth and the late Mr. Joseph Kay, Q.C., judge of the Manchester and Salford Palatine Court, were his brothers. He graduated at Trinity College, Cambridge, in 1844, and was called to the Bar at Lincoln's Inn in 1847, reading with the late Mr. George Lake Russell. Like many other

eminent lawyers, several of whom are now on the Bench, he started his career as a reporter. He was fortunate in the judge in whose Court he sat, the great weight attached to the judgments of Vice-Chancellor Wood, afterwards Lord Hatherley, giving a reflected importance to the five volumes of reports which bear the late Lord Justice's name. The first of these volumes was prepared by Mr. Kay alone; the remaining four were published in conjunction with Mr. Vaughan Johnson. In those days a good volume of reports was frequently the foundation of a large practice in the equity courts, and Mr. Kay, whose industry was inexhaustible, gradually acquired one of the largest businesses ever possessed by a junior in Lincoln's Inn. He was appointed a Queen's Counsel nineteen years after his call. His career as a leader was commenced in Vice-Chancellor Wood's Court, where in his early days he had sat as a reporter. He subsequently practised before Vice-Chancellors Giffard, James, and Bacon. It was before the last-named judge that he practised longest and acquired the most marked ascendancy. His chief opponent was Sir Henry Jackson, who was appointed a judge and died before he took his seat on the Bench. In 1878 the proportions of his practice justified him in becoming a 'Special,' and during the three years that preceded his appointment to the Bench in 1881 he occupied at the Chancery Bar a position scarcely less distinguished than that held by Sir Horace Davey and Sir John Rigby in later years. For an equity lawyer he possessed a considerable measure of oratorical power. He submitted his arguments in vigorous language, and emphasized his points with the gestures of oratory. Even on the Bench his utterances were marked by a fervour not common in the Courts. While he delivered his judgments his body was scarcely less active than his mind. He was appointed to the Bench on March 30, 1881, in succession to Vice-Chancellor Malins. Nearly twelve months, therefore, have passed since he became entitled to retire from the Bench on a pension. He proved to be one of the most valuable judges of the Chancery Division, being rapid in his methods, sure in his judgments, and conscientious as to the smallest details of his work. His firm and ready grasp of facts enabled him to secure in the hearing of witness cases a larger measure of success than most Chancery judges have obtained, while the vigour with which he addressed himself to the task of simplifying the precedents of the Chancery Division,

and of discouraging the institution of administration actions, though it sometimes led him into excesses of zeal, was largely instrumental in bringing about the improvements that have been effected in the business of the equity courts. On some occasions he appeared to entertain an exaggerated notion of his duty to the public, and this led him into making comments on the conduct of solicitors for which no real basis could be found. Such was the case, for instance, when he severely censured commissioners for oaths, who receive merely eighteen pence for their trouble, for not reading the affidavits they swear. Towards the close of 1890, on the retirement of Sir Henry Cotton, Sir Edward Kay was promoted to the Court of Appeal. His appointment was approved, not only because he was the senior judge of the Chancery Division, but also because of the success he had attained as a judge of first instance. Though all his professional life had been spent in the Chancery Courts, he speedily made himself familiar with the business of Appeal Court I., where the common law appeals are heard. He showed himself to be of independent judgment, and in several important cases differed from his colleagues. He was accustomed to give ample reasons for his decisions, and to deal at length with the cases to which reference was made at the Bar. His judgments in the Reports would probably be more valuable if they were shorter. The late Lord Justice's austerity prevented him from becoming a really popular judge, though the conscientiousness and ability with which he discharged his duties on the Bench, and the zeal and industry with which he assisted in the labours of the Rule Committee, were fully recognized. Nor could he be regarded as a great judge. Probably no occupant of the Bench had a larger knowledge of cases. But, owing no doubt to his early labours as a reporter, he was wont to rely too much on "authorities." He did not display on the Bench that grasp of principle which distinguished Sir George Jessel and Lord Bowen, and rendered them independent of "cases."—*Law Journal* (London).

POLITICAL ANTECEDENTS OF JUDGES.—"*Debrett's House of Commons and the Judicial Bench*" states that of the judges of the High Courts of Justice in England fifteen have won their way to the Bench after sitting as members of the House of Commons; in Ireland eight judges have used the same step to promotion; and in Scotland six judges of the Court of Session have been known as debaters in the House.

GENERAL NOTES.

BENCH AND BAR.—In an article dealing with encounters between Bench and Bar, suggested by the recent passage of arms between Mr. Justice Hawkins and Mr. Kemp, Q.C., the *Pall Mall Gazette* says: "Most dramatic scene of all, but not before an English tribunal, was that which gave a Lord Chancellor to England. In 1757 Wedderburn, under great provocation from Lockhart, another Scotch barrister, used language to him in Court at Edinburgh which certainly cannot be justified. It was undoubtedly, as the Lord President said, when at last he did interfere, "unbecoming an advocate, and unbecoming a gentleman." Wedderburn, beyond himself with passion, retorted, "His lordship had said as a judge what he could not justify as a gentleman," (an admirable formula, by the way, when the judge is wrong). The Bench promptly and properly resolved that he must at once apologise, under pain of deprivation. Without another word he pulled off his gown, laid it in front of him, and said, "My lords, I neither retract nor apologise, but I will save you the trouble of deprivation; there is my gown, and I will never wear it more; *virtute me involvo*," and with a bow he left the Court. That very night the future Lord Loughborough set out for London."

INTERESTING LIFE INSURANCE CASE.—Aaron Goldsmith and his wife were burned to death in New York City on December 20, 1896, and now there is going to be some litigation about a life insurance policy taken out on the husband's life for the benefit of his wife. The question being which of the two died first, relatives and heirs of both sides will lay claim to the money, and the life insurance company will pay the amount into Court and compel the parties to fight. It is not known exactly in which way the New York Courts will decide, but under the Roman law the presumption is in favour of the husband having survived the wife, as being the stronger; wherefore his relatives will be entitled to the money. But that law no longer applies here. Professor Meilziner, of the Hebrew Union College, has discussed the matter in the newspapers from the Rabbinical side, calling attention to a like question discussed by Hillel and Shamaï. In the Mishna the case is stated of a man and wife having no children, who perished together under the ruins of a house that tumbled over them. Her relatives claiming that he died first, demanded not only her dotal and paraphernal property, but also the dower due to her by Jewish law. His brothers, claiming that he survived her, hence held themselves out as sole heirs. The Shammaïtes held that since there is no possible way of determining who died first, the money in dispute is to be divided among the two contestants. Hillel, to the contrary, held that the property in dispute remains with the actual possessor, thus giving the wife's relatives only her paraphernal property. The Code of Maimonides and the Shulchan Aruch adopt this opinion. But in the present case the insurance money is in the hands of neither party.—*Jewish Chronicle*.

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CURRENT TOPICS AND CASES.

The judgment of the Court of Appeal in *Déchêne & Dussault*, delivered at Quebec, December 3, (6 Q.B. 1) is of considerable interest, further explaining, as it does, the view taken by the majority of the Court, of Art. 478 of the Code of Procedure. The article referred to provides that the losing party must pay all costs, unless for special reasons the court thinks proper to reduce them or compensate them, or orders otherwise. The rule in England is to the same effect. It is well established that the Court of Appeal will reform the adjudication as to costs when it appears that such adjudication violates a principle or positive rule of law. It is clear, therefore, that the "special reasons" must be reasons which are sound. In *Déchêne & Dussault*, the plaintiff, Dussault, having sued Déchéne on a promissory note, the latter pleaded the nullity of the note under art. 425 R. S. Q., (contract referring to an election), and the action was dismissed. The first court refused to give costs against the plaintiff, but the majority of the Court of Appeal held that the nullity of the note was not a good reason for refusing defendant costs, and this part of the judgment was reversed, Mr. Justice Blanchet dissenting. "L'exercice de la discrétion," observed the Chief Justice, "est subordonnée à l'existence d'une cause spéciale juste. Ce sont ces causes spéciales

qu'une cour d'appel doit examiner ; si elles existent, alors la cour n'interviendra pas ; mais s'il n'y a pas de bonnes causes, elle reformera." It would also appear that where no reason is stated in the judgment for the adjudication as to costs, the court will seek in the record for the motive which influenced the judge of the court below to deviate from the ordinary rule, and if no satisfactory motive can be found, the judgment will be reformed.

The Montreal appeal list has remained steadily for some time at 29, the printed lists for November, 1896, and January and March, 1897, containing precisely the same number. Of the 29 cases on the March list, 20 were appeals from the district of Montreal, or from judgments of the Court of Review, and 9 were appeals from country districts, viz., 6 from Ottawa, and 1 from each of the districts of Terrebonne, Richelieu and St. Francis. There was some difficulty at the opening of the term, in finding a case in which the counsel on both sides were present and ready to proceed, and the court finally was obliged to adjourn to the following day without having heard a case. During the term 11 cases (including two not on the printed list) were heard, two were settled or abandoned, and 18 were continued to next term, after the list had been twice called over without finding any one ready.

The death of the Hon. George Irvine, Q.C., of Quebec, has excited general regret. Mr. Irvine has been known for many years as an able lawyer, and he also took a prominent part in public affairs. He was appointed a Q. C. in June, 1867, and was one of the members returned to serve in the first Parliament of Canada after the Confederation of the provinces, on which occasion he represented Megantic. In 1884, on the death of Mr. G. O'Kill Stuart, Mr. Irvine was appointed his successor as Judge of the Vice-Admiralty Court of the city of Quebec.

HOUSE OF LORDS.

LONDON, 8 December, 1896.

NEVILL v. FINE ARTS AND GENERAL INSURANCE CO. (31 L.J.)

Libel—Defamation—Privilege—Statement in excess of privilege.

The Court of Appeal having decided that where in an action for libel the judge rules that the occasion was privileged the plaintiff cannot succeed in the action unless the jury find that the defendant was actuated by express malice, a finding by the jury that the defamatory statement complained of was in excess of the privilege is not enough.

Their Lordships (Lord Halsbury, L.C., Lord Macnaghten, Lord Shand, and Lord Davey) on these grounds, and also on the ground that in fact there was no libel, affirmed the decision of the Court of Appeal (64 Law J. Rep. Q. B. 681; L. R. (1895) 2 Q. B. 156), and dismissed the appeal with costs.

Counsel for respondent were not called upon.

COURT OF APPEAL.

LONDON, 19 March, 1897.

DODD v. CHURTON (32 L.J.)

Building contract—Delay in executing contract—Extras ordered by owner—Penalty.

Appeal from the judgment of a Divisional Court (Wills, J. and Wright, J.) affirming the judgment of a County Court judge.

The action was brought by the plaintiff, a builder, to recover a balance due under a building contract. The defendant, the building owner, made a counterclaim for 50*l.* by way of liquidated damages, for delay in completing the contract.

The contract was a contract for making certain specified additions and alterations to a house for a lump sum, and provided that the whole of the works were to be completed by June 1, 1892, under a penalty of 2*l.* per week for every week that any part of the works should remain unfinished after that date as liquidated damages. It was further provided that any authority given by the architects for any alteration or addition in or to the works should not 'vitiating the contract.'

Extra work to the amount of 22*l.* 8*s.* 8*d.* was ordered.

The works were not completed until twenty-seven weeks after June 1, 1892.

The defendant claimed damages for the delay at the rate of 2*l.* per week for twenty-five weeks, making no claim for two weeks within which time it was alleged the extra works might have been executed.

The County Court judge held that by the ordering of the extras the defendant waived the provision as to the payment of liquidated damages for delay, and gave judgment against the defendant upon the counterclaim.

Upon appeal to the Divisional Court Wills, J., was of opinion that the judgment should be affirmed, while Wright, J., was of opinion that the judgment should be reversed. The judgment accordingly stood.

The defendant appealed.

Their Lordships (Lord Esher, M.R., Lopes, L.J., and Chitty, L.J.) held that, upon the true construction of the contract, the builder had not agreed that the specified works as well as any extra work should be completed by June 1, 1892, and therefore that the case fell within the general rule that where the building owner has himself prevented the completion of the work at the agreed time by ordering additional work, he cannot recover damages for the delay. They therefore affirmed the judgment against the defendant on the counterclaim.

Appeal dismissed.

QUEEN'S BENCH DIVISION.

LONDON, 15 December, 1896.

GENERAL INSURANCE CO. OF TRIESTE v. CORY (32 L.J.)

Insurance, Marine—Ship's value declared in policy—Warranted by owner that portion of value should remain uninsured—Breach.

Action on policy of marine insurance, tried before MATHEW, J.

In 1895 the owner insured the ss. *Saltburn* with underwriters for 9,600*l.* The ship was valued at 12,000*l.*, and the policies contained a warranty that 2,400*l.* should remain uninsured. The plaintiffs underwrote 500*l.*, and reinsured with the defendants in a policy containing the same terms as the original policies. One of the original policies for 5,000*l.* was effected by the owner with the Shipowners' Syndicate. In December, 1895, the syndicate

posted a letter at Lloyds containing the following passage: 'May we ask those who hold policies to insure their risk elsewhere, and to cancel their existing policies, so that without much delay we may meet as far as possible all outstanding demands.' On December 21 the owner effected fresh policies for 3,000*l.*, calculating that this would cover the amount he should fail to obtain from the Shipowners' Syndicate. On December 30 the *Saltburn* became a total loss. The plaintiffs claimed 500*l.* against the defendants upon their policy of reinsurance, and were met by the defence that the warranty that the ship should remain uninsured for 2,400*l.* had been broken, since the owner had effected the fresh policy for 3,000*l.* It was proved that all the owner would receive under the policies effected by him would be 9,200*l.*

MATHEW, J., held that there had been no breach of the warranty. The owner was his own insurer for 2,400*l.* He had calculated that 3,000*l.* of his original insurance would become ineffective through the failure of the Shipowners' Syndicate, and in obtaining fresh policies for that amount had acted prudently, and had not effected an excessive insurance.

Judgment for the plaintiffs.

COURT OF COMMON PLEAS.

PHILADELPHIA, 29 January, 1897.

Before WILLSON, J.

MATTIS v. PHILADELPHIA TRACTION CO.

Negligence—Street railways—Measure of damages—Refusal of defendant to submit to a novel surgical operation.

Where a woman, previously of good health, who was both able and obliged to earn her living, is found by the verdict of the jury to have been turned, by the negligence of the defendant railroad company, from a condition of apparent vigor and health to a condition of almost complete wreck and dilapidation, the court, although not disposed to look with favor upon wild or extravagant verdicts, will not disturb a verdict of a size which in most other cases of a similar character would be altogether beyond propriety.

In cases of physical injury, it is the duty of the injured plaintiff to seek for and submit to such a surgical operation as would bring relief, when the operation is such that a person of ordinary prudence and regard for himself ought to submit to it.

While the victim of an accident might have experienced substantial relief and approximate cure by submitting to a surgical operation, which,

although comparatively new, and the professional mind not absolutely at rest as to the best method of performing, is regarded by the consensus of opinion as accompanied by comparatively slight risk of fatal issue, she is not obliged in law to undergo such operation nor assume the risk and anxiety attendant thereon, nor will her refusal to do so be considered as in relief of defendant's liability.

Rule for new trial. C. P. No. 4, Phila. Co.

The reasons assigned were, *inter alia*: (1) That the verdict for \$10,000 was excessive; (2) refusal to affirm defendant's fifth point, which point was as follows: If the jury believe from the evidence that the plaintiff was advised by a competent physician that, if she would undergo a surgical operation, she would be either materially relieved or permanently cured from the ill effects of the accident, and was also advised that said operation was neither serious nor dangerous, and that plaintiff refused to follow the advice of said physician, and that plaintiff's present condition is due, in part at least, to the fact that she refused to undergo said operation, she cannot charge the defendant company with liability for her present condition.

The evidence tended to show a clear case of negligence on the part of defendant resulting in serious injury to plaintiff. The verdict was for \$10,000.

WILLSON, J.:—In the discussion of this case, we do not propose to consider at any length the questions concerning the negligence of the defendant, or the amount of the verdict. There was undoubtedly sufficient evidence of negligence to sustain the verdict, and the amount found by the jury we do not regard, under the particular circumstances of the case, as so large or unreasonable as to justify us in setting aside the verdict upon that ground. We do not look with favor upon wild or extravagant verdicts in such cases as the present. At the same time, there are undoubtedly cases where justice can only be met by a verdict of a size which, in most other cases of a similar character, would be altogether beyond propriety. In this case the plaintiff, a woman of more than ordinary intelligence, who had shown herself possessed of considerable force of character, and who was engaged in making a livelihood for herself and family, is found by the verdict of a jury to have been turned, by the negligence of the defendant, from a person of apparent vigor and health to what is evidently a condition of almost complete wreck and dilapidation. There is no reason for supposing that

there is any exaggeration or imposition as to the present physical condition of the plaintiff. Her appearance and manner put her case beyond fair controversy upon that point. The principal struggle in the case was over the question as to whether or not the plaintiff was bound, after her injuries were received, to submit herself to an operation of a serious character, which she was advised to undergo, and which eminent physicians regard as accompanied by comparatively slight risk of fatal issue.....It may be said that the evidence of physicians and surgeons in the case makes the conclusion justifiable that a surgical operation would probably bring large or complete relief to the plaintiff from her existing physical troubles. The operation referred to is one of comparatively recent date, and perhaps it may be said that the professional judgment in regard to it, and the best method of performing it, is not as yet absolutely settled. In any event, it is a serious operation, from which any person, and particularly a woman of sensitive and nervous organization, would naturally shrink. Possibly it may be regarded as true that the overwhelming probability would be in favor of the operation being successful, and yet it can hardly be claimed that there would be no risk of serious consequences and even death following the operation. The plaintiff has been unwilling to submit to it, and it was contended on behalf of the defendant that, under such circumstances, her rightful claim against the company was, in any event, greatly reduced. The trial judge declined to take such a view of the case. The jury was instructed, in substance, that if they believed that a surgical operation would bring relief to the plaintiff, and that it was of such a character that a person of ordinary prudence and regard for herself ought to submit to the same, that then they should consider the plaintiff as having been under a duty to submit to the operation in order to bring relief from her physical ills. It may be that this instruction was quite as favorable to the defendant as justice or a true view of the case would justify. We are not disposed to go to any greater length. It does not seem to us reasonable that where one has been hurt by the negligence of another, we should hold him or her bound in law to undergo a serious and critical surgical operation, which would necessarily be attended with some risk of failure and of death. Some regard must be had to the instinctive human shrinking from such experiences. A person must be permitted to exercise a liberty of choice, under such

circumstances, as to whether suffering and feebleness will be endured, or whether the surgeon's knife shall be introduced. It seems to us it would be inhuman to hold any other view of the case, and that no principle of law requires us to do so.

Other points were raised upon the argument of this case, but we do not deem it necessary to refer to them.

We therefore hold that the rule to show cause why a new trial should not be granted must be discharged.

RECENT U. S. DECISIONS.

Damages.—A husband's right of action for the loss of his wife's society on account of injuries which resulted in her death is held, in *Louisville & N. R. Co. v. McElwain* (Ky.) 34 L. R. A. 788, to be defeated by a recovery of judgment for her death in an action by her personal representative.

So a right of action for damages resulting from death is held, in *Lubrano v. Atlantic Mills* (R. I.) 34 L. R. A. 797, to be exclusive of an administrator's right of action to recover for the pain and expense suffered by the intestate from the injuries which caused his death. With these cases are reviewed the different decisions on the question whether the causes of action for personal injuries and for death resulting therefrom are concurrent or alternative.

Electric wires.—The utmost care to keep the insulation of dangerous electric wires perfect at places where people have a right to go for work, business, or pleasure is held necessary in *McLaughlin v. Louisville Electric L. Co.* (Ky.) 34 L. R. A. 812, although at other places very great care may be deemed sufficient. And the fact that the insulation of the wires is very expensive or inconvenient is no excuse for failure to make it perfect at points where people have a right to go for work, business, or pleasure.

Evidence.—The destruction by a servant of his employer's books after the latter's death is held, in *Hay v. Peterson* (Wyo.) 34 L. R. A. 581, to be insufficient to raise a presumption that they contained charges against the servant, especially where they were not destroyed until after they had been examined and the servant claimed that in their destruction he was executing

his employer's orders. The cases on the presumption against the destroyer of evidence are reviewed in the annotation to this case.

Fire Insurance.—Gasoline kept as a part of the regular stock of merchandise is held, in *Yoch v. Home Mut. Ins. Co.* (Cal.) 34 L. R. A. 857, to be insufficient to avoid a policy which by its printed clause prohibits the keeping of gasoline but in its written description of the property insured named such stock "as is usually kept in country stores."

Murder.—The crime of murder is regarded, in *Debney v. State* (Neb.) 34 L. R. A. 851, as having been committed when the fatal blow or wound is inflicted, although death occurs at a subsequent date, so that the party is to be tried by the laws in force at the time the injurious act is done. The annotation to the case presents the other authorities on the question of the time when a homicide is deemed to be committed.

Lease.—A lease of the roof and outside of a party wall of a building projecting above the adjoining buildings for the purpose of advertising thereon by means of a stereopticon was in question in the case of *Oakford v. Nixon* (Pa.) 34 L. R. A. 575, and it was held that the lessee was not evicted and that the lease did not become invalid for want of consideration by the fact that the value of the wall for advertising purposes was destroyed by the tenant of the adjoining building who rented the roof of his building, with a screen constructed thereon, to another party for the purpose of advertising.

The owner of a building who has leased it as a place of residence is held, in *McConnell v. Lemley* (La.) 34 L. R. A. 609, to be not liable to a member of a surprise party visiting the tenant who is injured by means of a falling gallery.

And, on the other hand, it is held, in *Stenberg v. Willcox* (Tenn.) 34 L. R. A. 615, that a landlord is liable to a boarder on premises leased for a boarding house for injuries caused by the unsafe condition of the premises which was known, or might have been known, to the landlord by the exercise of reasonable care and diligence at the time of the lease but was not known to the boarder. With these cases are reviewed the authorities on the liability of a landlord for injuries to tenant's guests and servants from defects in the premises.

An injury to a tenant from the unsafe and dangerous condition of leased premises known to the landlord, or which might, with reasonable care and diligence, have been known to him, but not to the tenant, is held, in *Hines v. Willcox* (Tenn.) 34 L. R. A. 824, to render the landlord liable, although the tenant examined the premises and did not discover the defect. A note to the case reviews the other authorities on the question of liability to a tenant for defects in premises.

Although the owner of a building is not an insurer against accident from its condition, it is held, in *Ryder v. Kinsey* (Minn.) 34 L. R. A. 557, that he is bound to keep it in such condition, so far as he can by the exercise of ordinary care, that it will not, by any insecurity or insufficiency for the purpose to which it is put, injure any person rightfully in, around, or passing it. And the fall of the building without apparent cause will raise a presumption of the owner's negligence. With this case are reviewed the other authorities on the individual liability for falling walls or buildings.

Street railway.—Authority to a street railway company to cross any railroad operated by steam is held, in *Northern Cent. R. Co. v. Harrisburg & M. E. R. Co.* (Pa.) 34 L.R.A. 572, to give power to cross only where the railroad is crossed by a street or highway.

Negligence.—The injury of a person by eating unwholesome food at a restaurant is held, in *Sheffer v. Willoughby* (Ill.) 34 L. R. A. 464, to be insufficient to raise a presumption against the restaurant keeper that he was negligent or to make a *prima facie* case of liability on his part. But the person injured in order to recover damages must establish carelessness or negligence on the part of the restaurant keeper.

Recovery for a miscarriage resulting from fright caused by negligence is denied, in *Mitchell v. Rochester R. Co.* (N. Y.) 34 L. R. A. 781, on the ground that the damage was not the proximate result of the negligence, although the court recognized the fact that the authorities on the question are not harmonious.

A lord chancellor of England was once accosted by a confidence man with the salutation, "Mr. Birch, I believe." "Well," observed the tranquil jurist, "if you believe that, you will believe anything."

THE TRIAL OF ACCESSORIES.

Writs of error are now very rare, but that of *Richards v. Reginam*, argued on March 3, shows that they are occasionally necessary for regularity, if not for justice. Richards had been tried with one Jones at Cardiff Assizes before Mr. Justice Mathew for murder. The jury, under the direction of the judge, returned a verdict of manslaughter against Jones, and of being accessory after the fact thereto against Richards; the judge seems neither to have accepted any motion in arrest of judgment nor to have assented to the grant of a special case. This is the more remarkable because we understand that there was no evidence of any act by Richards, after the death of the person said to have been murdered, which could justify conviction as an accessory *after* the fact. Even to a tyro in criminal law and procedure it would be obvious that some statutory authority would be necessary to authorize trial for one felony and conviction of another, except in cases where the verdict while negating some parts of the indictment amounted to a finding in the terms of so much of the indictment as amounted to a substantive felony. And the procedure of the learned judge, if prophetic as to reform in criminal pleading, savoured of the mercantile irregularities of the Commercial Court rather than the stricter methods of the administration of criminal justice. The result was that the Attorney-General issued his fiat for a writ of error, and felt constrained himself to appear and confess that he could not argue in favour of the procedure at the trial. And this is abundantly clear both on principle and on the authorities. Section 3 of the Accessories and Abettors Act, 1861, permits the indictment and conviction of an accessory after the fact (1) as such with or after the principal felon, or (2) as for a substantive felony irrespective of the trial or conviction of the principal felon. Neither this section nor sections 6, 7, authorises the trial or conviction of the accessory with the principal felon, unless words are included in the indictment charging him as accessory after the fact; and the authorities recognize this to be the case, for in *Regina v. Fallon*, 32 Law J. Rep. M. C. 66, it was distinctly decided that a man could not be convicted as accessory after the fact when indicted as a principal felon, and in *Regina v. Brannon*, 14 Cox, 394, that the same man cannot be tried at the same time as a principal offender and as accessory after the fact, and that where the

indictment charges both offences the prosecution must elect on which to proceed. These cases, however, do not affect the right of a jury, when distinct persons are separately charged as principals and accessories after the fact to murder, to convict the principal of manslaughter, and the alleged accessories as accessories thereto, which was declared in *Regina v. Richards*, 46 Law J. Rep. M. C. 200.—*Law Journal* (London.)

STATEMENTS BY PRISONERS TO POLICEMEN.

There are two schools of opinion among the judges as to the policy or propriety of admitting in evidence extrajudicial statements by prisoners, and in particular statements made to a constable on arrest or in answer to inquiries made by a police officer with or without caution at or after arrest. Mr. Justice Smith in *Regina v. Gavin*, 15 Cox, 656, laid it down that when a prisoner is in custody the police have no right to ask him questions, and when the prosecution attempts to elicit statements made by a prisoner on arrest Mr. Justice Cave always disallows the question, but permits counsel for the defence to get the statements out if he wishes to do so. He has expressed his opinion decidedly in *Regina v. Male* (1893), 17 Cox, 689, to the effect that the police had no right to ask questions or to seek to manufacture evidence. He said the law does not allow the judge or jury to put questions in open Court to a prisoner, and it would be monstrous if it permitted a police officer, without anyone present to check him, to put a prisoner through an examination, and then produce the effects of it against him. He should keep his mouth shut and his ears open, should listen and report, neither encouraging nor discouraging a statement, but putting no questions. And this view is substantially the same as that expressed by Mr. Justice Hawkins, if we may judge from his preface to Howard Vincent's "Police Guide," and his ruling in *Regina v. Greatrex-Smith* (noted *ante*, p. 46, but not yet fully reported). A contrary rule was expressed by Mr. Justice Day in *Regina v. Brackenbury* (1893), 17 Cox, 628, who expressly dissented from *Regina v. Gavin*, and admitted statements made by the prisoner in answer to questions put by the police. The learned notes in Cox to both these cases affirm that the opinion of Mr. Justice Day is that sustained by the text-books and earlier decisions. But a good deal is to be said for the view that state-

ments made in answer to police questions about the time of arrest are made to persons of authority, and under fear, compulsion, or inducement, and that if admitted in evidence at all the circumstances under which they were made should be carefully scrutinized in accordance with the rule in *Regina v. Thompson*, 62 Law J. Rep. M. C. 93 ; L. R. (1893) 2 Q. B. 12, and the strong opinions of Mr. Justice Cave in *Regina v. Male*, which being expressed after *Regina v. Thompson*, appear with that case to justify the conclusion that *Regina v. Brackenbury* can no longer be regarded as of any authority. It is curious that the cases of *Regina v. Jarvis*, L. R. 1 C. C. R. 96, and *Regina v. Reeve*, L. R. 1 C. C. R. 362, do not seem to have been cited in *Regina v. Thompson*, and their authority or applicability seems to be considerably shaken by the late decision.—*Ib.*

PREPARATION FOR THE BAR.

At a Bar dinner in Philadelphia Mr. Richard Vaux, in responding to the toast of "The Bar," dwelt on the years of discipline which Chief Justice Gibson devoted to reading the writings of "the fathers," years which tended to weld the iron of his genius by the well directed blows of knowledge, so that genius, treated by knowledge, was converted into the steel of wisdom ; so that, to use Mr. Vaux's words, "he became able to write those matchless opinions which have been and always will be looked upon as *authority*. "How," asked Mr. Vaux, "was he able to do this? He lived in a country village, he had no clients and had to occupy his time in diligently practising economy ; he read Blackstone ten times a year ; he read Coke five times a year, and studied Ferne on Remainders till he knew what a remainder was."

"I always fear," says another great lawyer, "the young man who knows one book."

The other side of the question is presented in a story told of a late Chief Justice, famous for erudite knowledge. The person who relates the incident had occasion to visit him in chambers, when the conversation turned on a noted cause recently heard before the Chief Justice at *nisi prius*. Mr. B. had been of counsel, and speaking of his argument with half concealed contempt, the Chief Justice said : "B. took up the time of the court in arguing on general "*principles*," and discussing Coke and Littleton—but when I returned to my library, I took down my reports and found a "*case*" which was on all fours with the one at bar."

*ENGLISH VIEWS OF THE STATE OF THE BAR
AND QUALIFICATIONS FOR IT.*

Mr. Cock, Q. C., a barrister of London, recently confided to a representative of the press his views on the bar as a profession. He thought that a young man going to the bar should be prepared to support himself for at least five years independently of his profession, and referred to a judge now on the bench who waited quite ten years before he got a single brief. He might also have referred to the case of Mr. Justice Blackstone, who waited nearly fifteen years, during which time he had only two briefs, and then retired to the university to prepare his matchless commentaries, discouraged of success at the bar. According to Mr. Cock, it is not merely talent and ability that are required at the bar, but rather a combination of qualities. The bar, he thinks, is by no means overcrowded with men who have the qualities necessary for the work. This he proves by citing the fact that only a certain few men conduct all the big cases. A good voice, a good temper, and a good memory, are among the qualities that he considers necessary for success at the bar.

Another barrister has just contributed an article on "The State of the Bar" to the *National Review*. This writer seeks to disillusion young university men who think that their scholarship and eloquence will give them the prizes of the profession. "You are a great man here," said a great lawyer to a young don at Oxford, who announced his intention of adding the law to his conquests, "but at the bar you'll be dirt." The accumulation of a knowledge of principles, grasp of mind to assimilate and see the relations of facts, knowledge of men—these are the real stock-in-trade of the successful barrister. As for eloquence, he will be amply equipped for some time if he can put clearly a plausible suggestion. As for smartness, he is better without it; and as for guile, let him stifle the very thought of it until he has established a solid reputation for ingenuousness.

THE SUCCESSFUL PRACTICE OF LAW.

In a recent interview about the practice of law to-day and the probabilities and requisites of success, Hon. John F. Dillon said:

"The successful practice of the law in modern times requires very much more than a mere technical knowledge of the practical affairs of the world. Most cases do not present mere

abstract legal problems, but concrete problems—what is the best thing to do—which involves a knowledge of business usages and of the practical affairs of life.

“Successful lawyers are hard-working machines, and unless they have a good physical constitution they will fail of eminent success. No lawyer can succeed, or long succeed, unless in addition to the requisite intellectual qualities, he has also the requisite moral qualities.

“Integrity in the broadest sense, as well as in the most delicate sense of the term, is an indispensable condition to success in the law. Intellectual qualifications, fitness and integrity will not alone insure success. The successful lawyer must also have industrious habits. The successful lawyer is the lawyer who works and toils. He must have a genius for work. These are fundamental conditions. But all these exist and yet fail to bring any marked success, because success comes from a happy combination of physical and intellectual qualities, including will, power of decision, moral qualities, integrity and saving common sense, so that the advice which the lawyer gives shall be seen to be wise; that is, the advice he gives shall be practically demonstrated to be wise, as shown in the results. The modern client wants good results.”

GENERAL NOTES.

A FRONTIER JUDGE.—“One of the best ‘classics’ I ever knew, James Reilly, was through many years dependent on his muscles, not his brains,” writes the author of “Here and There Memories.” When he graduated from Dublin University he found himself a pauper—his guardian having robbed him. He went to the United States and served as trapper, navvy, farm-hand and frontier judge. He could make a piano, set a limb, grind an axe, splice a rope, mend shoes, plait a sieve, quote from the Greek poets, classify a bug, explain the binomial theorem, or fix the relation of two fossil fragments. His most cherished accomplishment was being able to lift a blacksmith’s anvil by his little finger hooked in the “eye” of the iron; his proudest recollection, that he had been an effective judge. Of his judgeship he told this story:—“I had just been elected judge there. A fellow, up for horse-stealing, consented to be tried by six jurors, as most of the men were off to a new gold-digging. Well, I summed up; the jury retired. I waited outside a long time, but the jury

waited inside a long time, too. The sheriff could not get in. I did when I had lost patience. Five of them, for conviction, were bailed up by the sixth for the acquittal of his friend. He would not let the five jurors out. He was a desperate chap, and they were mean white dirt. Well, I had to tackle him. When we commenced he was "the bully of Little Elk Creek;" when we ended, I was. He volunteered to bring in a verdict of guilty before I let him up, but I lost these two fingers of my left hand by a bowie-knife amputation. Oh, I was very popular there! My calm, firm administration of the law touched them."

GIRL STUDENTS.—Among the students at the St. Louis Law School this year are two young women. When the young women registered one of the professors remarked to a reporter: "We do not invite women to the school, for we have not the facilities that we would like to have for them, but they will come, and I suppose we may as well resign ourselves to the fact that they are going to study law, for they are entering the profession more and more."

BENCH AND BAR.—Under the heading of "Judges' License" *Law Notes* gives the following version of the scene between Mr. Justice Hawkins and Mr. Kemp, Q.C.:—"Mr. Willis was examining one of the railway officials in a certain case, and submitted to him a plan showing the position of the trolley, when Mr. Justice Hawkins interrupted him, stating that he should allow no costs of a third day in this case, remarking that the facts were quite clear. On Mr. Kemp, Q. C., rising to cross-examine the witness, his Lordship again interfered, saying, "These cases are spun out." Mr. Kemp: By whom, my lord? Mr. Justice Hawkins: By all parties. Mr. Kemp: Including your Lordship? Mr. Justice Hawkins: Don't be impertinent. Mr. Kemp: Your Lordship has no right to say I prolong cases. I reply that it is your Lordship. Mr. Justice Hawkins: I say that unnecessary questions are put to witnesses. Mr. Kemp: I am the person to consider whether it is necessary to put certain questions, and you have no right to say that. Mr. Justice Hawkins: Don't be impertinent, Mr. Kemp, and sit down. Mr. Kemp: I am not impertinent, it is your Lordship. It is not because your Lordship is sitting there that you have a right to address me in this language. Mr. Justice Hawkins: I do. Now Mr. Kemp lost his temper, but small blame to him when the Judge deliberately charges him with spinning out a case to obtain another refresher."

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CURRENT TOPICS AND CASES.

The paucity of the cases taken before the House of Lords in England bears testimony to the general excellence of the decisions rendered by the Court of Appeal, and also to the care and moderation which counsel use in recommending an appeal. In 1894 no more than fifty-eight appeals were entered. The small number of the appeals has led to a suggestion for the abolition of the appellate jurisdiction of the House. It has to be remembered, however, that each one of these cases involves careful consideration, and usually an important principle has to be defined or elucidated. It is doubtful whether the cases are not numerous enough to occupy fully the attention of the law lords. The *Law Journal* points out that the House is "essentially a judicial assembly, in which questions of law can be considered deliberately in the light of principle. The Court of Appeal, which consists of two sections, is bound by its own very numerous decisions, and cases are viewed primarily from the standpoint of authority. It may be said that the work which the House of Lords does in settling points of principle might be better done by the Legislature itself; but we all know how difficult it is to get the House of Commons

to deal with legal matters. It would be easy to give a long list of important decisions by which the House of Lords has affected and supported the commercial life and customs of the country. It is sufficient for our purpose to refer—merely as examples—to the recent 'one-man company' case, and to *Simmons v. The London Joint-Stock Bank*."

Governor Atkinson, of Georgia, in a message to the Legislature, has recommended a return to the old system of public executions. He writes:—"After a trial of some years, I am, after careful consideration, led to the conclusion that the law passed several years since, which abolished public hangings in this State, of which I approved at the time, was a mistake. I am still of the opinion that the impulse which leads people to eagerly seek to see one of their fellow-beings hanged upon the gallows is not a noble one. But we must deal with people as they are, and not as they should be. I believe that ten private hangings are not so effective in deterring evil doers and in commanding fear and respect for the law as one in public. To return to the old law, which left it to the discretion of the circuit judge to provide for either private or public hangings, would, I think, be a proper course. This can safely be left to the discretion of our judges. In my opinion, public hanging will aid in the suppression of crime and have some effect in discouraging mob law." The experience of Gov. Atkinson is not corroborated by that of England or Canada. No one has contended, so far as we are aware, that the privacy of executions in these countries has failed to inspire a proper respect for the law, or has tended to increase the number of capital offences. The reform which seems to be really needed, in several of the American States, is the enforcement of a little more privacy after the prisoner has been sentenced, and the placing of a wholesale restraint upon the sympathetic gifts and messages of silly people outside the jail.

Considerable attention has been given in England to the simplification of pleading and procedure. But it would appear that in actual practice there is still something wanting, for at the commencement of a recent trial, for negligence and breach of contract, the Lord Chief Justice called attention to the unsatisfactory system of pleading which was now so much in vogue. "Pleadings were drawn, in which the senseless sinuosities of the statement of claim gave rise to redundant denials in the defence, and the result was that there were several pages of printed matter where a few paragraphs would have sufficed. Such pleadings appeared to be drawn after the worst examples of the Court of Chancery."

A whole volume would hardly suffice to contain the eccentric efforts at legislation made by ambitious legislators. Some of them are ludicrous and nothing more, and they expire in the laughter they excite. Of this class is a law suggested by a law-maker in Michigan, who proposed that bills of fare in public dining-rooms must be printed in the English language only. This gentleman deserved some sympathy, for it is stated that being in a Chicago hotel lately, where the bill of fare was in French, he ordered five items, aggregating 80 cents, and discovered that he had asked for potatoes prepared in five different styles, and nothing else. Even in England there has been a curious proposition in a bill styled the "Verminous Persons Bill," the object of which is stated to be to enable persons infested with vermin to be cleansed and disinfected without going to a workhouse or casual ward; and for that purpose to have the use gratis of the apparatus, if any, possessed by any local authority for cleansing them and their clothing from vermin. It is not stated what examination the authority is to make before granting the use of its apparatus for catching the vermin. But the fatal defect is that it is proposed to make the cleansing optional. It is to be feared that in such case the authorities will not be troubled with many calls for the application of the law.

SUPREME COURT OF CANADA.

OTTAWA, 25 March, 1897.

New Brunswick]

JONES v. McKEAN.

*Trustee—Account of trust funds—Abandonment by cestui que trust
—Evidence.*

The holder of two insurance policies, one in the Providence Washington Insurance Company, and the other in the Delaware Mutual, on which actions were pending, assigned the same to M. as security for advances, and authorized him to proceed with the said actions and collect the monies paid by the insurance companies therein. By a subsequent assignment, J. became entitled to the balance of said insurance money after M.'s claim was paid. The actions resulted in the policy of the Providence Washington being paid in full to the solicitor of M., and, for a defect in the other policy, the plaintiff in the action thereon was nonsuited.

In 1886 M. wrote to J., informing him that a suit in equity had been instituted against the Delaware Mutual Insurance Company and its agent, for reformation of the policy and payment of the sum insured, and requesting him to give security for costs in said suit, pursuant to a judge's order therefor. J. replied that as he had not been consulted in the matter, and considered the success of the suit problematical, he would not give security, and forbade M. employing the trust funds in its prosecution. M. wrote again, saying, "As I understand it, as far as you are concerned you are satisfied to abide by the judgment in the suit at law, and decline any responsibility and abandon any interest in the equity proceedings," to which J. made no reply. The solicitor of M. provided the security and proceeded with the suit, which was eventually compromised by the Company paying somewhat less than half the amount of the policy.

Before the above letters were written J. had brought suit against M. for an account of the funds received under the assignment, and in 1887, more than a year after they were written, a decree was made in said suit referring it to a referee to take an account of trust funds received by M., or which might have been received with reasonable diligence, and of all claims and charges thereon prior to the assignment to J., and the acceptance thereof.

On the taking of said account M. claimed that all claim on the Delaware policy had been abandoned by the above correspondence, and objected to any evidence relating thereto. The referee took the evidence and charged M. with the amount received, but on exceptions by M. to his report, the same was disallowed.

Held, reversing the judgment of the Supreme Court of New Brunswick, that the sum paid by the Delaware Company was properly allowed by the referee; that the alleged abandonment took place before the making of the decree which it would have affected, and should have been so urged; that M. not having taken steps to have it dealt with by the decree could not raise it on the taking of the account; and that, if open to him, the abandonment was not established, as the proceedings against the Delaware Company were carried on after it, exactly as before, and the money paid by the Company must be held to have been received by the solicitor as solicitor of M., and not of the original holder.

Held, further, that the referee, in charging M. with interest on money received from the date of receipt of each sum to a fixed date before the suit began, and allowing him the like interest on each disbursement from date of payment to the same fixed date, had not proceeded upon a wrong principle.

Earle, Q.C., and *McKean*, for appellants.

Palmer, Q.C., for respondent.

QUEEN'S BENCH DIVISION.

LONDON, 18 January, 1897.

VALLANCEY v. FLETCHER (32 L.J.).

Ecclesiastical law—Brawling—Person in Holy Orders—23 & 24

Vict., c. 32, s. 2.

Case stated by justices.

Two informations were preferred by the respondent against the appellant, the Rev. John Vallancey, perpetual curate of Rosliston, for that he on June 13, 1896, was guilty of indecent behaviour in the churchyard of the parish church, contrary to section 2 of 23 & 24 Vict., c. 32, which provides that "any per-

son who shall be guilty of riotous, violent, or indecent behaviourin any churchyard," shall be liable to a penalty.

The justices found that the appellant had been guilty of violent and indecent conduct, and convicted him, but stated a case raising the question whether section 2 of the Act applied to persons in holy orders.

The Court (Wright, J., and Bruce, J.) held that the words of the section were perfectly general, and that there was no reason for cutting them down so as to exclude persons in holy orders. They therefore dismissed the appeal.

Judgment for respondent.

QUEEN'S BENCH DIVISION.

LONDON, 15 March, 1897.

CLARKE v. THE LONDON AND COUNTY BANKING CO. (32 L.J.).

Banker—Crossed cheque—Receipt of payment for customer—Liability of banker—Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 82.

Appeal from Dartford County Court.

The action was brought by the plaintiff against the defendants to recover the proceeds of a crossed cheque payable to the order of the plaintiff. The plaintiff's name was indorsed upon the cheque without his authority, and the cheque was paid by one Fisher, a customer of the defendants, into his account for collection. The amount of the cheque was collected by the defendants and placed to the credit of Fisher's account, which was at the time overdrawn. The County Court judge gave judgment for the defendants.

The plaintiff appealed.

The Court (Cave, J., and Lawrance, J.) held that the defendants were relieved from liability by section 82 of the Bills of Exchange Act, 1882, which protects a banker who in good faith and without negligence receives payment for a customer of a crossed cheque to which the customer has no title, and that the fact that Fisher's account happened to be overdrawn, and that the effect of the transaction was to clear off the overdraft, was immaterial.

Appeal dismissed,

STATEMENTS IN PRESENCE OF THE ACCUSED.

The ruling of Mr. Justice Hawkins at the Old Bailey, in *Regina v. Greatrex-Smith*, serves to call attention to an important point in the law of evidence. The defendant, a doctor, was charged with using instruments to procure miscarriage. The person upon whom they were said to have been used was dead. Shortly before her death, and knowing that she was dying, an inspector sent for the defendant and in his presence took down in writing the statement of the dying woman as to the cause of her death and the alleged use of instruments, which was signed by her. It was not taken as a dying deposition, no written notice had been given to the defendant to attend, and the statement was not made on oath nor in the presence of a magistrate, nor did the defendant admit the truth of any of the statements affecting him. The statement was at the trial tendered as evidence of a conversation held in the presence of the defendant, but was rejected because there was no evidence that the defendant assented to or admitted its truth, or as leading up to evidence of the conduct of the defendant. This ruling recalls the proper legal position of such statements. They are inadmissible except as explaining admissions or confessions, and the learned judge justly criticised the procedure adopted as permitting police officers to manufacture prejudice by extracting statements from dying persons.—*Law Journal*.

THE BRAWLING ACTS.

The judgment in *Vallancy v. Fletcher* on January 18 ought to have a salutary influence on such of the clergy as spend time in making unseemly trouble in assertion of their rights over the soil of churchyards, or protest against burials under Osborne Morgan's Act. Mr. Justice Wright and Mr. Justice Bruce held that for such acts clergymen are not amenable only to ecclesiastical jurisdiction, but can be proceeded against under section 2 of 23 & 24 Vict., c. 32, for riotous, violent or indecent behaviour in the churchyard. The particular case arose through the sexton—under directions and in the presence of the perpetual curate—insisting on levelling the grave of a parishioner and using violence and bad language to the relations who attended to protest. The Court decided nothing as to the right of the perpetual

curate to level the mound, while the justices rejected a claim of *bona fide* right on his part. The result was the successful prosecution of the perpetual curate by a churchwarden for the mode in which he asserted his claims.—*Ib.*

CHIEF JUSTICES OF THE U. S. SUPREME COURT.

The office of Chief Justice of the Supreme Court of the United States was established by the Constitution concurrently with the office of president, but while the presidency has been open to all native-born citizens above the age of 35, the office of chief justice of the Supreme Court, bestowed usually upon men of mature, if not advanced, years, has been held in fact by seven persons only since the foundation of the government. There has been more than three times as many presidents, says the *New York Sun*.

John Jay, of New York, was the first chief justice of the Supreme Court. He was appointed by Washington in 1789, Judge Jay was at that time only 44 years of age. When he attained the age of 50 he resigned and retired to private life. He died thirty-four years later—in 1829. The second of the Supreme Court justices was John Ellsworth, of Connecticut. He was 54 years of age when appointed, and served until 1801, when he resigned, resignation from public office being somewhat more frequent at that time than now. His successor was John Marshall, of Virginia, who was 46 years of age when he assumed the post by appointment of President John Adams. He held it uninterruptedly for thirty-four years, until his death in 1835.

Andrew Jackson appointed his successor, Roger B. Taney, of Maryland, who held the office until his death, in 1864. Judge Taney was 59 years of age when appointed and 87 at the time of his death. No chief justice of the Supreme Court, perhaps, had more intricate questions to determine or to vote upon in that tribunal than Judge Taney, and his tenure and that of Chief Justice Marshall stretch over nearly one-half of the history of the United States as a nation. Chief Justice Taney's successor was Salmon P. Chase, of Ohio, who had previously been secretary of the treasury, and was 56 years of age when appointed. He served for nine years, dying in 1873. Mr. Chase was himself a candidate for the presidency, and had hoped to defeat Mr. Lincoln for renomination and to succeed him, and later, in 1868, it is

known that Mr. Chase was a candidate for the democratic nomination for the presidency, though he had been one of the founders of the Republican party. Chief Justice Chase was succeeded in 1873 by President Grant's appointment of another Ohio man, Morrison R. Waite, who was 57 years of age when appointed, and served until 1888, when he was succeeded by the present chief justice, Melville W. Fuller, appointed by President Cleveland. Mr. Fuller is a native of Maine. He was, when appointed, 55 years of age, and was 64 on February 11, 1897. He is the seventh of the chief justices of the Supreme Court, and has served thus far a briefer term than any of his predecessors since Chief Justice Ellsworth.

*COKE AND BACON—THE CONSERVATIVE LAWYER
AND THE LAW REFORMER.¹*

Sir Edward Coke used to say:—"If I am asked a question of common law, I should be ashamed if I could not immediately answer it; but if I am asked a question of statute law, I should be ashamed to answer it without referring to the statute books."

If any one ever knew all about the common law, Coke was undoubtedly the man. With a constitution that was proof against illness and fatigue, with a memory that never relaxed its grasp, he gave to the study of the common law all his available time and energy, from his youth until he died in extreme old age. His learning, vast but not varied, began and ended with the common law, for which he entertained feelings of reverence amounting to fanaticism. He said that there were rules of the law for which no reason could be given; a circumstance that in his eyes clothed them with a mysterious sanction, and conferred on them an additional value. A mere dry legist, he cared more for the six carpenters than he did for the seven sages of Greece. Possessing not the slightest tincture of general literature, scorning all foreign systems of law, as well as the philosophy of law in general, which he considered to be matters wholly irrelevant and speculative, he was perfectly at home with executory devises, contingent remainders, shifting and springing uses, and all the other technical creations of the law of tenures, which made up a great part of the common law. One could easily

¹ From an address delivered by Hon. U. M. Rose, of Arkansas, before the Virginia Bar Association, at its last meeting at Old Point Comfort.

fancy that he lisped of these things in his cradle, and that they peopled his dreams in later life. They were to him as household words; and he knew all of their playful ways and cunning habits. Few men could say as much, for that kind of learning was extremely technical and difficult; and Coke's pre-eminence in this respect was universally conceded. Chance and circumstance had had much to do with the development of the law of tenures, but selfishness and perversity had operated to render it so artificial and intricate that many of its complications tasked or eluded the most highly trained intellects; a fact of which Coke at one time furnished a most striking illustration.

It is well known that Coke was consumed with ambition and with avarice. Twice he increased his estate by rich marriages; and the emoluments derived from his practice were so great that, by the time he got to be chief justice of the Court of King's Bench, he was one of the largest land owners and one of the wealthiest men in England. Hoping after his downfall that, through the influence of the King's favorite, he might be restored to power and position, he forced his daughter to marry Sir John Villiers, the brother of the Duke of Buckingham, preparatory to which union he drew up a settlement by which he settled a large estate on the ill-sorted couple. Of course such documents were closely scrutinized; and the all-powerful and intriguing family of Buckingham must on this important occasion have had the aid of as good lawyers and conveyancers as could be found; but when, years after the death of Coke, the terms of the settlement were spelled out with the labor that is required to decipher an Assyrian tablet, it was discovered, to the surprise and admiration of lawyers deeply versed in the technical learning of feudal tenures, that the title to the estate, after performing various unexpected and extraordinary feats, had at last vested in fee simple in the right heirs of Sir Edward Coke; where it still remains.¹

It is needless to say that Coke was not a reformer. His object was to perpetuate, and not to change. Indeed, reform was not the order of the day. It is difficult for us now to picture his immediate surroundings. All the English-speaking people in the world in his time did not equal the present population of the State of New York; and London, a town of the Middle Ages,

¹ For an explanation of the method by which this was done, see 2 Wash. Real Prop. 294.

dim, dingy, unlighted, uncared for, with its picturesque contrasts between royal pageantry and squalid poverty, contained at that time probably not more than 300,000 inhabitants, crowded down close to the river under the shadow of the Tower. The irregular and badly paved streets, the rows of ancient houses in every stage of decay, whose monotony was broken here and there by a church or a residence of more pretensions, presented a prospect that was not suggestive of impending change. Things were much as they were in the days of the Plantagenets; and they would probably so continue. As a lawyer, the owner of many broad acres, and with such surroundings, it was not surprising that Coke should favor the established order of things.

If we look back to the Elizabethan period, we shall find that the connection then existing with antiquity was close and intimate. Whoever was educated at all could read Homer and Plato in the original, and could speak Latin, the common medium of communication between persons of cultivation all over the world. A slavish adulation of antiquity was the most prominent feature of the civilization of the age. There was a prevailing bigotry on the subject that could only be compared with the ancestor worship of the Chinese. Pierre la Ramee, a contemporary of Coke, a scholar, a virtuous and an honorable man, was persecuted all his life, and was finally assassinated, because he ventured to dispute some of the theorems of Aristotle. Giordano Bruno, the friend of Sir Philip Sidney, who visited England when Bacon was a student at Gray's Inn, and whom Bacon must have known, followed in the footsteps of la Ramee, and suffered a like fate. He has left on record his opinion of the course of teaching then in use in the English universities. "Rhetoric, or rather the art of declamation," he said, "is their whole study; and all the philosophy of the universities consists of a purely technical knowledge of the Organon of Aristotle; and for every violation of its rules a fine of five shillings is imposed."¹

Outside of theological writings, where there was an occasional mention of the millennium, and outside of the writings of Bacon, there was never any expression of hope as to the future of our race; not even in the writings of Shakespeare, in which almost everything else can be found. The work of the world seemed to have been done, and Time to be leaning on his scythe. Scholastics still continued languidly their war of words. Nowhere

¹ Giordano Bruno par Christian Bertholmeas, Paris, 1846, p. 102.

did the spell of antiquity lie heavier upon the minds of men than in England. We have the most abundant evidence of the fact that the spoken language of the time differed only very slightly from that which we speak to day; but the written language was commonly so affectably archaic that if Coke or Bacon or Selden had given a written order for a dozen of eggs from a neighboring grocer's, he would have done so in language such as was used two hundred years before.

Coke was a tall, fine-looking, handsome man—a man of imposing aspect, strong in body, strong in mind. His form and features have been so happily preserved for us by the art of the painter, his character has been so clearly portrayed by contemporaries, that we seem to see him, as he appeared as attorney-general on his way to Westminster to browbeat Raleigh, or to bully some other hapless prisoner, who was denied the benefit of counsel, and who, single-handed, could ill withstand the torrent of vituperation and abuse which was poured out on him by the prosecution; or again as he appeared on his frequent way to the Tower to examine prisoners subjected to torture. On such occasions he walked very erect, with an air of extreme self-reliance bordering on arrogance. A vigorous, pompous man that never deflated; masterful and abounding in resources; he was dogmatic, proud, revengeful, aggressive, rude, dictatorial, peremptory, cruel, obstinate, unforgiving and tyrannical; a man far better suited to excite fear than love. A terrible reminder of him is extant in several volumes of examinations of prisoners taken "before torture, during torture, between torture, and after torture," amid what cries and howlings we know not, all in his well-known handwriting.

Coke was unquestionably a man of distinguished ability, and of great learning in his particular specialty; but as he thus passed along the streets of London and Westminster, he often met two men so immensely superior to himself in point of intellect as to render comparison absurd; two men each of whom has formed an epoch in the history of human thought; Shakespeare, of whose life we know almost nothing, and Bacon, of whose life we know too much. One of these he hated, the other he despised.

It is quite impossible that Coke should not have known Shakespeare by sight; though it is extremely improbable that he ever spoke to one whom he regarded as an idler and a repro-

bate, and whose manuscripts he would gladly have tossed in the fire. His custom, when he became chief justice of the Court of King's Bench, was to charge the grand juries that all players should be punished as vagrants; that is, that they should be placed in the stocks, and whipped from tithing to tithing. Yet this man, who had probably never seen a play, was not a Puritan: he was only by nature hard, stern, unimaginative and austere, a man of the type of the unbending Pharisee. For this and for many other reasons Coke has received but little mercy at the hands of lay historians and biographers. As he never spared others, so they have not spared him. Macaulay, in speaking of Coke's marriage with his second wife, Lady Hatton, rejoices to know that "she did her best to make that bad man as miserable as he deserved to be."¹ His great enemy, Bacon, appreciated the value of her services. When he came to die, he left her a legacy in his will.

With lawyers Coke has fared far better than with laymen. He was not altogether a bad man, as Macaulay would have us believe; and if we had to make a critical estimate of his character, we should be compelled to vote on him by sections. He was

"———like the toad, which, ugly and venomous,
Wears yet a precious jewel in its head."

One of the things that is most highly prized by lawyers is an able, learned, unbiased, fearless and independent judiciary; having the qualities that Coke undoubtedly possessed, as conceded by his enemies, and even by Bacon himself.

One of his odious characteristics was his extreme pedantry; for he was the greatest pedant of a pedantic age. When, after having been chosen speaker of the House of Commons, he was presented at the bar before Queen Elizabeth for her approbation, he began his address in this delicate and pleasing vein:—

"As in the heavens a star is but *opacum corpus* until it hath received light from the sun, so stand I *corpus opacum*, a mute body, until your highness' bright shining hath looked upon and allowed me."

Much more followed of the same sort. Why it was that the earth did not immediately open and swallow him up is a mystery that has never been satisfactorily explained.

¹ Essay on Bacon.

But we lawyers remember another scene in which Coke appeared to more advantage—a moment when he nobly cast to the winds the honors and emoluments of office, and all the benefits to be derived from royal favor, at a time when royal favor and royal resentment were well-nigh omnipotent. When James I., called in those days the "Solomon of the North," having resolved to finish the work of subjecting the English people to slavery, so nearly accomplished by the Tudors, and having the twelve judges on their knees before him, asked them whether in the future they would not refuse to decide anything adverse to the royal prerogative, upon which eleven of them answered in a chorus "Yes;" in that critical juncture Sir Edward Coke, forgetting to chop Latin, and talking as good Anglo-Saxon as ever yet man spoke, answered with sublime simplicity, and in words that are immortal: "When the case happens I shall do that which shall be fit for a judge to do." We remember too, how, when obsequious deference to kingly power was almost universally prevalent, after years of striving against adverse circumstances, he at last got through the Parliament that "Petition of Rights" which finally stayed the exactions of the Stuarts, and placed English liberty upon an imperishable foundation. Remembering these things, remembering also that Coke's is still the greatest name in the history of our jurisprudence, that he has been quoted a hundred times where any other judge or law writer has been quoted once, recalling also the fine expiatory discipline of Lady Hatton,—we are disposed to forgive him all his sins.

Coke, who had resolved to know nothing but the law, and the common law at that, and Bacon, who had taken all knowledge for his province, seemed to have been born to be enemies. Coke often scoffed at the wide and miscellaneous learning of Bacon, who in his turn was exasperated by the narrowness and bigotry of Coke. It was not difficult to make an enemy of Coke; but Bacon was an agreeable person, learned, witty, wise, an entertaining and instructive companion, a forcible and persuasive speaker, by temperament bland, affable, charitable, liberal and conciliatory. Excepting Coke it would seem that he never hated anybody; but the gratuitous insults and contumely publicly and repeatedly bestowed on him by Coke finally stirred up in him a sentiment of hatred that was foreign to his tolerant nature, a feeling of hostility that afterwards never slept. They were

rivals in everything, even in love—if a headlong steeplechase for the hand of a rich widow can be called by that name; and neither of them ever asked for quarter, or made the slightest concession. History hardly presents another example of individual hostility so deeply seated, so unremitting, so long continued. No feud of the Capulets and the Montagues or of the Guelphs and the Ghibelines ever developed more ill-will. It seems a pity that these two extraordinary men should have been contemporaries; for without the other either might have had all the wealth and honors to which they both aspired with all the zeal which ambition and avarice could breed. As it was, their antagonism embittered and blasted the life of each. It was largely through the influence of Bacon that Coke was stripped of the ermine, and consigned to the Tower, where he had been times without number to see the rack and the thumb-screw applied to the helpless victims of the law. The gloomy structure must have had a strangely familiar look to him when the huge iron doors closed upon him. But his day of triumph came when he helped to drag Bacon from the woolsack, and to stamp on his brow the indelible mark of infamy.

It has been said that every man is, consciously or unconsciously, a follower of either Aristotle or of Plato; but Bacon was not a disciple of either. With that fine comprehensive glance which enabled him to dispose of a whole system in a few words, he said that Plato subordinated the universe to thought, while Aristotle subordinated it to words. With Bacon the universe stood not solely for either intellect or for logic; but every phenomenon required a separate and an unbiased study for itself. Only by the evidence of the senses, painfully and laboriously employed in every possible direction, could the secrets of the sphinx be discovered. Bacon was the first and the greatest of the moderns. Without assistance he closed the record of the past, and raised the curtain upon the modern world. The phrase "the interpretation of nature" was invented by him to denote a process seemingly the most obvious of all; but which was the last thing thought of. Of all the ancients he most closely resembled Socrates, who had indeed told men that their generalizations were based on no accurate knowledge. But Socrates confined the field of his inquiries to questions of intellect and of morals; by which unfortunate limitation he delayed the progress of civilization for more than two thousand years.

[Concluded in next issue.]

GENERAL NOTES.

NERVOUS SHOCK.—The interesting question of the liability for a negligent act producing a mere nervous shock or mental injury—the subject of decision by the Privy Council in *The Victorian Railways Commissioners v. Coultas*, L. R. 13 App. Cas. 222; 8 Eng. Rul. Cases, 405—has been decided in the New York Court of Appeals (to be reported in 151 New York Reports), and it was there held, in harmony with the English case, and reversing the decisions below, that there is no liability where a negligent act produces mere fright in a woman, although it results in a miscarriage. The Court held that the damages were immediate and proximate, but based its decision mainly on the ground that there is no right of recovery for injuries produced merely by fright, no matter how serious, or however directly the result of the mental shock. There is a little authority to the contrary in the States and in Canada, and the authorities are arranged in the American notes in 8 Eng. Rul. Cases, 414.

VENERABLE PRECEDENTS.—The Selden Society will issue in the course of next week volume x. of its publications, "Select Cases in Chancery, A.D. 1364-1471," edited by Mr. W. Paley Baildon, F.S.A., with an introduction on the growth, early history, and procedure of the Court of Chancery. This volume represents the publication for the year 1896. Volume xi for 1897 is expected to follow very shortly, and will be a second volume of "Select Pleas in the Court of Admiralty," edited by Mr. R. G. Marsden.

A SHARP CRITICISM.—The *London Law Journal* says:—"It is with great regret that we have again to comment on a recurrence of those disputes between judge and counsel of which the Court in which Mr. Justice Hawkins presides has of late been too often the scene. On the present occasion there seems no doubt that he was solely to blame. Not only was his manner unnecessarily provocative, but he had no justification for the accusation of misconduct which he made against the eminent counsel who were appearing before him. In no quarter does a judge receive more support than from the legal profession, yet we entertain no doubt as to how the Bar and solicitors alike will regard this unpleasant case. It is to be hoped that Sir Henry Hawkins will follow the example of other judges, and will not again be led into conduct which is alike injurious to the administration of justice and derogatory to the dignity of the Bench and Bar."

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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, 7 April, 1897.

Present : LORD HERSCHELL, LORD WATSON, LORD MACNAGHTEN, LORD MORRIS and LORD SHAND.

LAROCQUE, appellant, v. BEAUCHEMIN ET AL., respondents.

*Joint stock company—Subscription of stock—Payment in cash—
Article 4722, R. S. Q.*

Article 4722 of the Revised Statutes of Quebec provides that "the capital stock of all joint stock companies shall consist of that portion of the amount authorized by the charter, which shall have been bond fide subscribed for and allotted, and shall be paid in cash."

Held (affirming the judgment of the Court of Review, Montreal, Q. R., 9 S. C. 73):—*Where there is no fraud or simulation, and the transaction is in good faith, anything which is in law equivalent to a payment, or which would be in law sufficient evidence to support a plea of payment, is a "payment in cash" within the meaning of this section.*

LORD MACNAGHTEN:—

The appellant is the liquidator of a company called "La Compagnie de Papier de Sorel," incorporated in 1886, under an Act of the Provincial Legislature of Quebec known as "The Joint Stock Companies Incorporation Act." The authorized capital stock of the Company was \$100,000, divided into 1,000 shares of \$100 each. The subscribed capital was \$55,000, or 550 shares.

The respondents are some of them shareholders and the rest the representatives of deceased shareholders in the company.

The shareholders whose representatives are parties to the action, together with those of the respondents who were themselves shareholders, were the promoters of the company. From them the company bought the property upon which it carried on its business; and they held the whole of the subscribed stock with the exception of 50 shares belonging to Mr. Finlay, the manager.

The action was brought to recover from the respondents in their individual or representative capacities sums amounting in the aggregate to \$25,000. The relief sought was based on fraud and nothing else. The declaration in the action stated that although the nominal and ostensible price of the property was \$35,000, the real price actually paid was \$10,000 only, and it charged that the property was in fact worth no more; the difference, according to the statement in the declaration, was accounted for in the books of the company by means of entries which the appellant as plaintiff alleged to be false and fictitious, making it appear that the promoters had paid up their shares in full while \$25,000 still remained unpaid.

The facts are not in dispute. The property had belonged to a company called "The St. Lawrence Pulp and Paper Company" which failed almost immediately after it commenced operations. The liquidator put the property up for sale by auction in March, 1886. It was then bought by or on behalf of four persons interested in the old company for the sum of \$9,000. The purchasers entered into communication with certain persons described by the respondent Beauchemin, who was one of their number, as "capitalists," with the view of forming a new company and re-establishing the business. M. Beauchemin was called as a witness by the plaintiff. He said that the four purchasers represented that the property which they had bought was worth \$50,000 but that he would not take it at that price, and as the result of negotiations it was agreed that the property should be sold to the new company as soon as it was formed for \$35,000, and that the difference between that sum and the auction price, which by the addition of interest and incidental expenses was brought up to \$10,000, should be for the benefit of the promoters of the new company, that is for the four purchasers, and M. Beauchemin and his friends.

The evidence as to value was clear and uncontradicted. A. M. Pontbriand, a manufacturer living in Sorel, who was interested

in the old company, was called for the defence. His firm, he said, had made the machinery and put it up. He knew the property well. Including land, buildings and machinery, it had cost about \$80,000, a sum which unfortunately exhausted the whole of the capital of the company. He valued the property at the time of the liquidation of the old company at \$41,150. At the time of the sale the machinery was in perfect order, but the buildings required some slight repairs, which might cost \$1,000 or so. For the purpose of a paper manufactory the property was, he considered, worth \$40,000. It would have cost the new company from \$50,000 to \$55,000 to provide itself with similar works elsewhere.

On the 5th of May, 1886, the promoters and Mr. Finlay, who had then joined the enterprise, having subscribed between them \$55,000 towards the joint stock of the proposed undertaking, held a provisional meeting as shareholders in the new company. The meeting appointed provisional directors and authorized them to make an immediate call on the capital subscribed, and to apply for incorporation. The directors accordingly met and made a call of 75 per cent. payable on the 20th of May.

On the 26th of June, 1886, a petition for incorporation was presented on behalf of the shareholders in the new company. The petition set forth the particulars required by the Act, including the names of the shareholders and the amounts subscribed by them respectively. Letters patent incorporating the new company were duly granted on the 5th of August.

On the 3rd of September a meeting of the shareholders was held; the minutes of the former meetings were read and adopted, and directors were appointed. At a meeting of the directors held on the same day, the President, M. Beauchemin, was authorised to sign in the name of the company the deed of sale of the property and to acquire it from the then owners for the price of \$35,000, and a final call was made of 25 per cent. payable on the 16th of October.

In September, 1886, the promoters were credited in the books of the company with payment in full of their shares. The amounts so credited were paid half in cash and half by receipts given to the company by the vendors to the extent of \$25,000 on account of the purchase price of the property.

After working for about two years and a half the company went into liquidation. In June, 1889, the appellant was

appointed liquidator, and in March, 1890, he was authorized to institute this action.

The action came on to be heard before the Superior Court on the 24th of November, 1894, when it was dismissed with costs. The Court held that the plaintiff had failed to prove the material allegations of his declaration. The judgment was affirmed on appeal by the Superior Court sitting in Review on the 31st of December, 1895.

It appears from the reasons given by the Honorable Mr. Justice Jetté that the only question argued before the Court of Review was whether the shares of the promoters were paid in full, having regard to the provisions of Article 4722 of the Revised Statutes of Quebec which formed part of the Statute under which the company was incorporated. That article so far as is material to the present question is as follows:—

(1.) The capital stock of all Joint Stock Companies shall consist of that portion of the amount authorized by the charter which shall have been *bonâ fide* subscribed for and allotted and shall be paid in cash.

.....

(5.) Every form and manner of fictitious capitalization of stock in any joint stock company or the issuing of stock which is not represented by a legitimate and necessary expenditure in the interest of such company, and not represented by an amount of cash paid into the treasury of the company, which has been expended for the promotion of the objects of the company, is prohibited, and all such stock shall be null and void.

Jetté, J., considered that par. 1 of article 4722 which was originally enacted as Sec. 1 of the Quebec Statute, 47 Vict., cap. 73, was a reproduction more or less exact of Sec. 25 of the Imperial Statute known as the Companies Act, 1867. Construing the expression "paid in cash" in Article 4722, par. 1, by the light of well known English authorities as to the meaning of the same words in Sec. 25 of the Imperial Statute of 1867, his Honour held that the shares of the promoters were fully paid.

Before their Lordships an attempt was made to re-open the charge of fraud which seems to have been abandoned in the Court of Review. It was urged that the price of the property was not fixed or considered by an independent Board of Directors and that in this respect the transaction was improper and fraudu-

lent. This argument seems to be based on a misconception of the decision in the *New Sombrero Phosphate Company v. Erlanger*, 3 App. C. 1218, where the facts were very different. In the present case it was not disputed that every single shareholder was perfectly aware of all the circumstances attending the formation of the company, and that nobody was or could have been deceived. Indeed their Lordships agree with the opinion of Jetté, J., who prefaced his judgment by observing that the promoters acted in perfect good faith and that the value of the property was proved to be \$35,000 at the least.

The learned counsel for the appellant then contended that the understanding between the parties was that the property should be sold for so much in cash and so much in shares. It was admitted that if this had been the real arrangement it would be in contravention of the Statute. But the evidence is all the other way. According to the evidence there was an independent agreement on the part of the promoters to take so many shares presently payable in cash and an independent agreement by the Company to purchase the property for so much money down. There was not even an attempt in cross-examination to shake the testimony on this point.

The appellant's counsel were at last driven to question the authority of *Spargo's case*, (8 Ch. 407) and the long line of decisions in which that case has been approved and followed. They pointed out that on more than one occasion *Spargo's case* has been disapproved by the present Lord Chancellor (*Re Johannesburg Hotel Co.*, 1891, Ch. 119; *Ooregum Co. v. Roper*, 1892, A. C. 134), and they asked their Lordships not to follow it.

Their Lordships are not prepared to dissent from the decision in *Spargo's case*. It is a decision of the highest authority. It was pronounced by James and Mellish, LL. JJ., and the view which those eminent judges expressed had as appears from their judgments the approval of Selborne, L.C. Referring to *Fothergill's case* in which Sec. 25 of the Act of 1867 was considered and in which judgment had been delivered only the day before by the Lord Chancellor and the Lords Justices. James, L.J., made the following observations which are not inapplicable to the facts of the present case:—"It was said by the Lord Chancellor, and we entirely concurred with him, that it could not be right to put any construction upon that section which would lead to such

•

“ an absurd and unjustifiable result as this, that an exchange of
“ cheques would not be payment in cash, or that an order upon a
“ banker to transfer money from the account of a man to the
“ account of a company would not be a payment in cash. In
“ truth it appeared to me that anything which amounted to what
“ would be in law sufficient evidence to support a plea of pay-
“ ment would be a payment in cash within the meaning of this
“ provision.....If a transaction resulted in this, that there was on
“ the one side a *bond fide* debt payable in money at once for the
“ purchase of property, and on the other side a *bond fide* liability
“ to pay money at once on shares, so that if bank notes had been
“ handed from one side of the table to the other in payment of
“ calls, they might legitimately have been handed back in pay-
“ ment for the property, it did appear to me in *Fothergill's case*,
“ and does appear to me now, that this Act of Parliament did
“ not make it necessary that the formality should be gone
“ through of the money being handed over and taken back
“ again; but that if the two demands are set off against each other,
“ the shares have been paid for in cash..... Supposing the trans-
“ action to be an honest transaction, it would in a Court of Law
“ be sufficient evidence in support of a plea of payment in cash,
“ and it appears to me that it is sufficient for this Court sitting
“ in a winding-up matter. Of course, one can easily conceive
“ that the thing might have been a mere sham or evasion or
“ trick, to get rid of the effect of the Act of Parliament, but any
“ suggestion of sham, or fraud, or deceit, seems to be entirely out
“ of the question in this case, because everybody in the company
“ knew of the transaction; every shareholder of the company
“ was present and was a party to the resolution; there was no
“ deceit practised on any creditor, nor was there any registration
“ of these shares, except as shares paid up. This seems to me to
“ dispose of the case.” “ It is a general rule of law,” added
Mellish, L.J., “ that in every case where a transaction resolves
“ itself into paying money by A to B and then handing it back
“ again by B to A, if the parties meet together and agree to set
“ one demand against the other they need not go through the
“ form and ceremony of handing the money backwards and for-
“ wards.” Even if this line of argument were less convincing
than it appears to their Lordships to be, they would not be dis-
posed to disturb an authority which has been accepted and acted
on for more than 20 years.

It is to be observed that in the Quebec Statute the expression "paid in cash" occurs in one place and "paid in cash into the treasury of the company" in another, from which it may be inferred that "payment in cash" does not necessarily and in all cases mean payment "into the treasury of the company."

In the result their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

It appears that during the pendency of the appeal proceedings were stayed against two of the respondents, against each of whom the claim was under the appealable limit. The order will include the dismissal of the appeal with the usual consequences as against those two respondents.

Hon. Edward Blake, Q.C. (of the Canadian Bar), for the appellant.

Cozens-Hardy, Q.C., Geoffrion, Q.C. (of the Canadian Bar), and *J. Austen Cartmell*, for the respondent.

COKE AND BACON—THE CONSERVATIVE LAWYER AND THE LAW REFORMER.

[Concluded from p. 143.]

In 1592, when Bacon was thirty-one years of age, he proposed in the House of Commons a plan to amend, consolidate and condense the whole body of English laws, to reduce them in bulk, to simplify them in form, and to render them consistent, leaving out all repetitions and whatever was obsolete.

Coke, who was nine years older than Bacon, and was also in Parliament at that time, was in the plenitude of his powers, and had almost reached the meridian of his fame. No proposition could have been made to which he would have been more averse. Coming from anyone it would have been odious; coming from Bacon it was detestable. Everything was a mystery in those days, even the making of shoes and hats; and it was due to the dignity of the law that it should be the greatest of all mysteries. In the good olden time its mystery had been properly guarded and preserved, because legal proceedings were recorded in law Latin which Cicero could not have read, or in law French which no living Frenchman of woman born could understand; but now,

in a less reverent and more iconoclastic age, such proceedings were required to be preserved in English, which was only rescued from vulgarity by many technical terms borrowed from other languages, and by a peculiar and antiquated phraseology. The proposition to deprive the law of the last vestige of clothing, and thus to expose it naked to the laughter of its enemies, was no less sacrilegious than indecent. The simplification of the law would be the undoing of it, since no one would respect what every one could understand. The English constitution would be overturned, life would lose its sweetness, chaos would come again, and death would be the only refuge. We may be sure that Coke said something about the rash presumption of inexperienced youth. He probably concluded by denouncing Bacon as an enemy of mankind and a traitor to his country.

In this contest the odds were greatly in favor of Coke, a fact which he knew full well. As a scholar in politics Bacon excited a certain amount of distrust, which was enhanced by the novelty of his proposition. As a politician Coke was immeasurably his superior. Long afterwards Bacon, looking back over his career, said of himself that he was better suited to hold a book than to play a part. In an extremely conservative age the precedents of centuries weighed heavily against him. Nothing of the sort had been tried since the compilation of the old Byzantine codes, of which but few legislators had ever heard. In this respect, as in many others, Bacon was very far ahead of his age. Had he succeeded, the evolution of our law would have been wholly changed; and English jurisprudence, instead of lagging behind the continental systems, would have led the van in the march of reform. In England his effort fell still-born; but it attracted marked attention abroad, and served to accelerate the development of the law in alien lands.

Bacon, great as he was, was in no sense a universal genius, as he has sometimes been pictured in imagination. Never, save in fancy, did the universal genius exist. Outside of the sphere of his genius, Bacon was shorn of his strength, and was like unto other men. Though he had the flight of an eagle, yet he always skimmed along close to the surface of the earth. He tried his power in architecture, both theoretically and practically; but the results were unqualified failures; and his metrical translations of the Psalms must always take rank along with the worst speci-

mens of poetry ever produced in our language. He had unbounded genius for whatever is practical; but farther his genius did not go. Curiously enough, the civilization which he projected, wonderful beyond conception, partakes largely of all of his defects. As the law is, or ought to be, above all things practical, it was strictly within his domain. He had not the marvellous technical knowledge of the common law that made of Coke an oracle in his profession; but he possessed a comprehensive insight into the spirit, adaptability and philosophy of jurisprudence which Coke could never have acquired.

So thoroughly conscious was Bacon of the necessity of the work for which he had endeavored to obtain the sanction of Parliament, that he afterwards resolved to carry it out as an individual enterprise. In his "Proposal for Amending the Laws of England," addressed to James I., he showed that he had thoroughly matured his scheme, and that he contemplated nothing revolutionary. "I dare not advise," he said, "to cast the law into a new mould. The work which I propound tendeth to pruning and grafting the law, and not to plowing it up and planting it again; for such a remove I should hold indeed for a perilous innovation."

This great work, which might have been the crowning glory of almost any lifetime, was never to be accomplished. Bacon spoke of it in his last years regretfully as a work that required assistance, and that he had been compelled to forego. The failure has been a loss irreparable; for no one that ever lived was better qualified for such a task than Bacon. It seems strange, that in his busy life, animated by such extensive designs, filled with so many vicissitudes, he should have formed this plan so early and should have brooded over it so long. Bacon's capacity for labor was something marvellous. During the four years that he was chancellor he cleared off the long arrears of Ellsmere, and passed judgment in 36,000 cases, though during that period he presided over the House of Lords, was active in all affairs of State, participated in all kinds of social functions, and added largely to his voluminous writings, most of which were translated into Latin, either by himself or by others under his supervision. From early manhood he was a frequent debater in Parliament, and until he ascended the bench he was engaged in an extensive practice in the courts; so that, although it might

seem that his printed writings would exhaust the labors of a lifetime, yet they represent but a small part of the work that he performed; hence it is only matter for surprise that he accomplished as much as he did.

Though the more important works of Bacon were published in Latin in order to render them everywhere current among scholars, yet they were very soon translated into several modern languages, so that they might be made accessible to a still larger circle of readers. They produced a profound impression, but their scope was not fully understood; and it cannot be said that they were received with much favor. Church and State remained attached to the old moorings; and the bar, always conservative save where a principle of public liberty is involved, adhered rigidly to the methods of Coke. The great majority of scholars were blindly, fanatically attached to the old order of things. Outside of a very small circle of personal friends, such as Sir Henry Wotton and Hobbes of Malmesbury, it is doubtful whether Bacon, up to the time of his death, had made a single convert; and the subsequent progress of his doctrine was slow, being achieved in spite of many obstructions. When Dr. Johnson, a little more than a hundred years ago, spoke of the study of science as being derogatory to the higher faculties of the mind, he echoed the sentiment of a great majority of his countrymen. Newman said that, even in his time, Oxford was a mediæval university.¹ It is only within the last twenty or thirty years that the Baconian philosophy can be said to have attained to a definite triumph; and even now a belated combatant occasionally fires a random shot at the advancing column; but no damage is done, and the incident is soon forgotten.

Bacon is the only great and radical reformer who was not at the same time an ardent propagandist. Judging from the effect of his teachings, the man that fired the Ephesian dome was but a timid conservative compared to him; but he promised no Utopia, and besought no man to enlist under his banner. Indeed so frequent and impressive was his advice against a rash acceptance of any novel doctrine, that it may almost be questioned whether he himself did not entertain misgivings as to the beneficial effects to be anticipated from the tremendous mine

¹ *Apologia pro vita sua*, p. 149.

that he was engaged in planting under the venerable bastions of antiquity. Convinced that everything is experimental, and that caution should preside where the issues are uncertain and are so immense as to affect the entire future of humanity, he said: "It were good therefore that men in their innovations would follow the example of time itself, which indeed innovateth greatly, but quietly, and by degrees scarce to be perceived;" and he recommended that "novelty, though it be not rejected, yet be held for a suspect." But it is difficult to believe that when he said in his last will, "For my name and memory I leave it to men's charitable speeches, and to foreign nations, and to the next age,"—he did not anticipate the final success of a revolution compared with which all other revolutions were only the dust of the balance.

It would require volumes to recount the triumphs of utilitarian science founded on the philosophy of Bacon, including all the inventions and discoveries of modern times, which constitute the theme of common declamation. Doubtless the debt we owe to him exceeds all of our powers of computation; but it is not possible to make a gain in one direction without a corresponding loss in some other. If Bacon really had any misgivings as to the ultimate effects of his teachings, events have proved that his fears were not wholly without foundation; for the countless victories of science have failed to bring to our race that spirit of peace and contentment, rarer even than happiness itself, which has been the dream of the wise and the good ever since the world began. While we boast of our increasing knowledge, we must confess that our progress has raised up social questions that seem to defy solution, and that threaten to overturn the framework of society; that the present age is in profound revolt against ills of life that seem to be incurable, and that were formerly borne almost without complaint; and that the constantly increasing complexities of modern life tend continually to make of existence a more deadly and desperate struggle.

If it would be difficult to count up the debt that we owe to Bacon, it is equally impossible to compute what we have lost. A hundred years ago one of the first judges of the Supreme Court of the United States spoke of the Scotch philosophy of Thomas Reid as being as great a discovery as the discoveries made by Sir Isaac Newton. But alas for the mutability of things, the

philosophy of Thomas Reid interests the present generation no more, while all the other systems of philosophy from Thales to Comte and Schöpenhauer are drifting out of sight. It is a subject worthy of reflection that these tremendous derelicts, embodying the speculations of many of the greatest minds that ever lived concerning the faculties, the surroundings, the origin and destiny of man, hardly produce a ripple in the current of modern thought.

If one should spend his life in counting, weighing and classifying grains of sand in a valley, he would, no doubt, in the course of time acquire a wonderful dexterity in that pursuit; but he would hardly possess a fit conception of the beauty and grandeur of the outline of the surrounding hills. "The business of the poet," said Imlac in *Rasselas*, "is to examine, not the individual, but the species; to remark general properties and large appearances; he does not number the streaks of the tulip, nor describe the different shades in the verdure of the forest."

No; he deals not with minute details and sundries; and in an age of details and sundries we have eliminated the poet. If Bacon planted the seeds of a revolution that overturned the work of Coke, he has rendered another Shakespeare impossible. Not by the aid of parliamentary grant or congressional appropriation, nor by the organization of gigantic corporations, can the sacred muse be wooed back to a world which she has deserted. The legitimate drama has been banished from the stage, or returns only after long intervals to revisit the scenes of her former triumphs. Barren as were the Middle Ages in most fields of thought and action, yet they brought forth new types of architecture that have been found worthy to take their place alongside of the immortal creations of Greece and Rome; while we, in the way of originality, only succeed in producing hideous skyscraping structures that, as seen from the surface of the moon, cast their long, black, revolving shadows over the neighboring houses and streets. If at times we display great interest in the arts of painting and sculpture, it is mostly of the kind that is got up to order; but of that exquisite sense of the beautiful that made the illiterate Athenian multitude the finest art critics that the world has ever seen, we have not a trace; and in the absence of it we pin our faith to the guide-books. Our literature, made up now almost wholly of works of fiction, is nearly as ephemeral as

the publications of the amateur writers of stories in the daily papers. At intervals of a few months some novel is acclaimed as immortal, by enthusiasts that could not tell the name of it a year later.

The eloquence of the statesman has degenerated into the rant of the demagogue. Chrysostom and Savanarola, Bossuet and Massillon, Stillingfleet and Wesley and Whitfield, sleep in their hallowed tombs, and have left no successors. It would be a pleasant thing for us to have at the bar such men as Erskine and Curran and Webster and Pinkney; but the age does not produce them, and we get along the best we can without them. It was said long before Napoleon that there is but one step from the sublime to the ridiculous; but in an age in which we have become painfully conscious of the limitations of our powers, the ridiculous has gradually encroached on the sublime until there is only a fading line between them; and in deadly and constant fear of crossing it, we timidly take refuge in the commonplace. Music itself, heavenly maid, of all the fine arts the oldest, the most faithful and the tenderest friend of man, she who has soothed and comforted his sad heart in every time of sorrow ever since the morning stars sang together, is said by some to be undergoing a like eclipse.

This also was in our destiny. Wonderful as are the advantages that we have derived from the scheme of Bacon for the improvement of mankind, yet it cannot be denied that in some respects our adoption of it has been like the second eating of the forbidden fruit. This was the inevitable consequence of his teachings, the sum and substance of which was that we should put lead on our wings; that we should no more be led by sentiment, nor seek the inaccessible, nor dally with the vague and the undefined. And we have kept the faith; and are keeping it more and more strictly as the years go by, with more and more emphatic results. It is only the other day that Professor Goldwin Smith declared that if he lives a few years longer he expects to see the last poet, the last horse, and the last woman; three things that will certainly be missed. A little reflection would have convinced him that the last poet has already passed by.

These are things that we cannot help. Though we may sometimes look regretfully to the past, as Schiller looked back to the Gods of Greece, or as Mary of Scotland gazed on the receding

shores of France, yet our way is onward; and we shall never more be content to sit down by the deserted hearthstones of our ancestors. Perhaps hereafter some genius as original as Bacon, and equally unheralded, shall reveal to men some better way that is now hidden from our eyes.

If the law in its higher aspects has failed in its development in respect of harmony, or symmetry, or unity, or facility of being understood, that result has been reached through causes that Bacon distinctly pointed out and repeatedly warned us against. Although he recommended the closest, most analytical and most discriminating scrutiny of individual instances, thereby opening the door to infinite diversity, yet he urged, in the most impressive manner, that through this diversity, by means of arrangement, co-ordination and scientific classification, we should re-establish unity and harmony and symmetry, on larger, truer and more intelligible foundations; a process not applicable to poetry and the fine arts, which were not within his scheme, but one which is, above all things, applicable to the law.

No one was ever so great a destroyer as Bacon; but he did not destroy for the sake of destruction, but only for the purpose of building again with lasting materials on a more secure basis. Everywhere he inculcated the necessity of classifying and organizing all facts of external observation, not only with a view to the preservation of knowledge, but also with a view to facilitate the making of new discoveries, looking also possibly to that unification of knowledge, which, up to this time, remains no more than a pleasing dream.

It might have been supposed that the law, being largely experimental, and naturally adjusting itself easily to comprehensive rules, would have offered the most obvious and inviting field for the exhibition of the theories of Bacon; but his teachings have had perhaps less effect on English law than on any other science. The practice of reporting individual cases, which he found established, was an anticipation, to some extent, of his methods of critical inquiry as to individual instances; but the legal profession rejected his doctrine of careful classification and constant and scrupulous revision upon every new accession of knowledge. It is, however, a safe prediction that his doctrines, triumphant in all other fields of inquiry, must eventually prevail in English and American law also, the most intractable of all materials yet encountered.

With his greater singleness of purpose, Coke was enabled to accomplish, though in a very different way, a task that Bacon was compelled to forego. Though not the author of the English system of reporting, he brought the art to a degree of perfection never before attained, and rarely reached in latter times; he gave to the office of reporter a new dignity and importance; while in his commentaries upon Littleton he covered the whole field of English law as it then existed. His reverence for antiquity prevented him from discriminating between things in full force and things obsolescent and things obsolete; and hence he devoutly preserved every technicality that was anywhere imbedded in the law; thus hampering legal development along the lines of natural justice and equity, and raising up that large and influential body of lawyers, who, adhering always to the strictest letter of the law, made a fetish of every conceivable technicality; lawyers who rendered perpetual homage to the deified Quibble; who shuddered at the thought of an erasure in a deed; who were ready to go into convulsions at a suggestion to amend a pleading; and who seemed really to believe that the universe would some day be derailed and destroyed by a misplaced comma.

There is no doubt but that Coke's work was and remains a colossal monument of labor and industry. He was the Moses that led the profession out of the wilderness of the year-books, the abridgments, the unwritten, the confused and undefined customs. Before this, the law was but poorly understood, or was not understood at all; but Coke flattered himself that, with his commentaries, which offered a short road to knowledge, a man might hope to attain to some acquaintance with the common law after the lucubrations of twenty years; a saying that must have filled the hearts of the students of the Inner Temple with exceeding joy.

When the crowning edifice of the common law was thus made complete, Bacon had already set at work the forces that were to effect its demolition. The common law established a lay and ecclesiastical hierarchy reaching from the serf to the throne. The political fabric was mortised and riveted together in every possible way. The penal laws were hardly less bloody than those of Draco. The feudal system of land laws, with its fantastic complications, its oppressive exactions, afforded a striking

example of the culmination of aristocratic misrule. Though the institution of chivalry, now an object of universal derision, had struck the first blow in her interest, woman, by the common law, remained a slave from her cradle to her grave. In short, there was some reason for saying that the law, as it then existed, was "the result of the blundering and chicanery of several generations that in legal language is called the wisdom of the age."

The common law possessed, however, one virtue that redeemed many sins. It was instinct with that political liberty that was born and nurtured among the tribes that lived in the shadows of the great oaks of Germany for ages before Tacitus placed their simple customs in contrast with the meretricious manners of Imperial Rome.

But whatever its virtues or faults may have been, it was not endowed with the permanence which the rigidity of its structure gave to it in the eyes of Coke. The chancellor was already engaged in smuggling into the country the equitable principles of the civil law, which were at a later day to filter into the common law courts until the whole lump should be leavened; and the new civilization, starting into life at the voice of Bacon, was to render the affairs of life so varied and complex as to make the common law system wholly inadequate to the wants of men.

What Bacon desired was that Parliament should enter upon a career of cautious, prudent and enlightened law reform. The work of Coke was conceived in a different spirit; but his name as a jurist was so great, his accuracy so surprising, that his summing up of existing law acquired an authority almost as absolute as that of a legislative enactment. They were both great men, and great lawyers; but their methods were essentially different. Coke had all the qualities of a great judge, and Bacon had all the qualities of a great judge except the indispensable virtues; one was the greatest of reformers, the other belonged to the ranks of the most extreme conservatism.

CIRCUMVENTING THE MICROBES.—How a witness may kiss the Testament without incurring the dangers that lurk in the ceremony is a problem that has been ingeniously solved in the Northampton County Court, where a witness, at the instance of his Honour Judge Snagge, was sworn on a Testament wrapped in clean paper. If the intervention of paper between the book and the lips does not detract from the sanctity of the oath, the practice that prevails among certain witnesses of kissing their thumbs will not possess the effect which they now fondly believe it to have.—*Law Journal*.

THE LEGAL NEWS.

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CURRENT TOPICS AND CASES.

The decision in *Wilkinson v. Downton*, noted in the present issue, is the latest on the subject of mental shock. The case arose from a practical joke of the worst sort. The court has decided that the injury suffered by the victim of a cruel hoax is not too remote a consequence of the act to hold the perpetrator responsible. Persons who are addicted to heartless and stupid tricks of this nature will receive no sympathy when they come within the reach of the law.

A number of changes and appointments were made by the outgoing government in the prothonotary's office at Montreal. Presumably these changes are the outcome of the official inquiry that has been proceeding for several months past into the working of the different departments, and the inequality of the salaries paid to the employees. It is to be regretted, however, that the new appointments and changes should even in appearance seem to have been hastened by the defeat of the government. The organization of the prothonotary's office in Montreal is a matter of great importance, and although official inquiries during the past ten years have not been few, the result has not been remarkably apparent.

Reference was made recently to eccentricities of legislators. One of the strangest of these proposals was made by a member of the Kansas legislature, who incorporated the ten commandments in a draft bill, and sought to have it made part of the criminal law of the State. The preamble reads as follows :—

AN ACT TO GIVE STATUTORY FORCE TO THE TEN COMMANDMENTS.

Whereas, The men of the present generation have become doubters and scoffers ; and

Whereas, They have strayed from the religion of the fathers ; and

Whereas, They no longer live in the fear of God ; and

Whereas, Having no fear of punishment beyond the grave, they wantonly violate the law given to the world from Mount Sinai.

Ten sections follow, each of the commandments constituting a section. The eleventh section provides penalties for offences under the Act.

The May list of the Court of Appeal at Montreal showed a sudden increase from 29 cases, at which figure the list had remained for three terms, to 42, an increase of ten over the list for May, 1896. The bar will not regret to see some evidence of a return to the active business which formerly existed in this court. The increase in itself is not surprising when it is remembered that the Court of Review and the Superior Court during the last eight months have poured forth an unusual number of judgments, as the result of the effort to clear the rolls. The May term lasted somewhat longer than those of the last year or two, but nevertheless it was brought to a close on the eighth day of the sittings.

The death of Mr. S. B. Bristowe, Q. C., recently judge of the Southwark County Court, recalls the fact that he was the victim, some years ago, of a form of revenge which is now happily rare. In 1889 he was county judge of Nottinghamshire, and one day while he was standing on the railway platform at Nottingham, a disappointed

suitor fired at him, and the injury was so serious that his life was for some time in danger. It was before the X rays were discovered, and he carried a bullet in his body for the rest of his life. Judge Bristowe, although suffering great physical pain, continued to sit until a few days before his death.

The vacant position of Judge of the Vice-Admiralty Court at Quebec has been filled by the appointment of Mr. Justice Routhier. He is gazetted as "a local judge in admiralty of the Exchequer Court for the Quebec Admiralty district." The duties of the office are now extremely light, not more than one or two cases usually coming before the court in the course of a year. Mr. Justice Routhier retains his position as a judge of the Superior Court, and receives an additional sum of \$1000 per annum for the Vice-Admiralty work. A saving of about \$1500 is thereby effected. If special knowledge of marine affairs be not essential, no very good reason seems to exist why the duties should not be performed by the Superior Court judges at Quebec, as part of their ordinary work.

Liberal governments evidently do not make the reduction of professional representation in the cabinet one of the planks of their platform. The new Quebec Cabinet has only one mercantile representative. The premier and treasurer, Hon. F. G. Marchand, is a notary and journalist. The provincial secretary and registrar, Hon. J. E. Robidoux; the attorney-general, Hon. Horace Archambeault; the commissioner of agriculture, Hon. F. G. Miville Déchéne; the commissioner of lands, forests and fisheries, Hon. S. N. Parent; the commissioner of colonization and mines, Hon. A. Turgeon; the commissioner of public works, Hon. T. Duffy; and the Hon. G. W. Stephens, member without portfolio, are all lawyers. The medical profession has one representative in Hon. J.

J. E. Guerin, without portfolio. The only mercantile representative, Hon. J. Shehyn, is without portfolio. The bar of Quebec cannot be charged with excessive diffidence in asserting their pretensions.

After an honourable judicial career of forty-two years, Chief Justice Hagarty, of the Court of Appeal, Ontario, has retired from the bench, and has been succeeded by Mr. Justice Burton, a member of the same court. Chief Justice Hagarty has filled the office of Chief Justice for thirteen years. The vacancy in the Court has been filled by the appointment of Mr. Moss, Q.C., of Toronto.

NEW PUBLICATION.

A TREATISE ON THE LAW OF EVIDENCE.—By the late Judge PITT TAYLOR. Ninth Edition.—By G. PITT-LEWIS, Q. C. With notes as to American law by Charles F. Chamberlayne. Two volumes. Toronto, The Carswell Co., Publishers.

It may be noted, in the first place, with respect to this new edition of a standard work, that it is the first London law book printed in Canada, and contains every page of the London edition. And the price (\$12.50) is considerably lower than that for which English law books can usually be purchased.

There are some features which distinguish the present edition from those which preceded it. American notes, containing United States and Canadian decisions, have been specially prepared for the use of lawyers on this side of the Atlantic, which are not to be found in the English edition. The matter in the previous edition has been abridged by the elimination of so much of it as related to mere details of practice. In the table of cases, references have, for the first time, been furnished to every report of each case which could be ascertained to exist; and to save repetition these references are given in a separate table, the footnotes merely giving the date of the decision. The English editor states that a further large saving of space has been made by "remorselessly pruning all exuberance of expression, even sometimes, it may be, at a sacrifice of style and rhetorical effect." As a general rule we should be sorry to see this system applied to classic writings. But in a work dealing with the law of evidence exuberance of expression and rhetorical effect may be dispensed with, though the style of the author should be altered as little as possible. The necessity for compression, however, may be realized when it is noted that the table of cases cited extends over 235 pages of

small type, and the Index occupies 270 pages. We do not find that Quebec cases have been much drawn upon in the American notes; but the difficulties of the French language, in which a considerable number of the reports appear, may be responsible for this to some extent.

An excellent service has done for the profession in Canada by placing this work in their hands, and we trust that the enterprise of the publishers will be amply rewarded.

QUEEN'S BENCH DIVISION.

LONDON, 6th May, 1897.

Before HAWKINS and WRIGHT, JJ.

DERBYSHIRE v. HOULISTON (32 L. J.)

Adulteration—Written warranty—Nature, substance, and quality of article demanded—Scienter—Sale of Food and Drugs Act, 1875, (38 & 39 Vict. c. 63) s. 27.

Case stated by the stipendiary magistrate for the city of Manchester.

The appellant was summoned under section 27 of the Sale of Food and Drugs Act, 1875, upon the information of the respondent (an inspector of nuisances for the city of Manchester), for giving, on September 8, 1896, a false warranty in writing to a purchaser, to wit Martin Hopkins, in respect to an article of food, to wit butter, then sold by him to the said Hopkins; and subsequently, to wit on September 16, 1896, sold by Hopkins to the respondent, the said article not being of the nature, substance, and quality of the article demanded by the respondent.

By section 27 of the Sale of Food and Drugs Act, 1875, it is provided that 'Every person who shall give a false warranty in writing to any purchaser in respect of an article of food or drug sold by him as principal or agent, shall be guilty of an offence under this Act, and be liable to a penalty not exceeding twenty pounds.'

On September 16, 1896, the respondent purchased at the shop of Hopkins, a pound of butter, marked 'Pure Butter, 10d.' The butter was adulterated, containing 23 per cent. of water.

Hopkins had, on September 8, 1896, purchased the butter from the appellant as being the same in nature, substance, and quality as that demanded of him by the respondent, and with a written warranty to that effect. The written warranty contained the words, 'Warranted Pure Butter.' Hopkins had no reason to believe at the time when he sold it that the article was otherwise,

and he sold it in the same state as when he purchased it. The appellant purchased the butter on August 22, 1896, from one Moloney, as the same in nature, substance, and quality as that so sold by the appellant to Hopkins, and with a written warranty to that effect, and the appellant had no reason to believe at the time when he sold it to Hopkins that the article was otherwise, and the appellant sold it in the same state as when he purchased it. The written warranty received from Moloney by the appellant contained the words, 'Guaranteed Pure Irish Butter.'

The magistrate being of opinion that it was not necessary to prove that the appellant at the time when he gave the warranty to Hopkins knew that it was false, convicted him.

C. A. Russell, Q.C. (F. H. Mellor with him), for the appellant, contended that guilty knowledge on the part of the appellant in giving the warranty to Hopkins must be shown.

The COURT held that guilty knowledge must be shown, and quashed the conviction.

Conviction quashed.

QUEEN'S BENCH DIVISION.

LONDON, 8th May, 1897.

WILKINSON ET UX. v. DOWNTON (32 L. J.)

Damages—Mental shock—Deceit—False statements intended to deceive—Illness consequent upon shock so caused—Right of action—Remoteness.

Further consideration of an action, tried before Wright, J., and a jury, upon the question whether the action was maintainable and damages recoverable.

The plaintiffs, a licensed victualler and his wife, sought to recover damages from the defendant for false, fraudulent, and malicious representation under the following circumstances.

On April 9, 1896, Wilkinson went to some steeplechases. On the evening of that day the defendant called at his public-house and told Mrs. Wilkinson that there had been a "smash-up" of the waggonette in which her husband and his friends were returning from the steeplechase meeting; that her husband was lying at a public-house on the road very seriously injured, and with his legs broken; that her husband desired the defendant to request Mrs. Wilkinson to come to him at once and bring certain articles necessary for his comfort.

This story turned out to be an absolute fiction; but the distress of mind undergone by Mrs. Wilkinson till the hoax was discovered brought on an illness which for a time endangered her life, and put the plaintiffs to great expense. In answer to questions left to them by the learned judge, the jury found that the defendant spoke the words alleged; that he meant them to be heard and acted on; that they were believed and acted on; that they were false to his knowledge; that Mrs. Wilkinson's illness was the effect of the shock from the words. They assessed the damages at 100*l*.

WRIGHT, J., held that the action was maintainable. The defendant had wilfully done an act calculated to cause, and which had caused physical pain to the female plaintiff, and had infringed her legal right to personal safety. The effect of this act was not too remote to be regarded in law as a consequence for which the defendant was answerable. Judgment for the plaintiffs.

COURT OF APPEAL.

LONDON, 9th March, 1897.

Before LINDLEY, L. J., SMITH, L. J., RIGBY, L. J.

SIMPSON v. HUGHES (32 L. J.)

Contract by letters—Acceptance—Sale of land—Inquiry as to date of purchase—Request that fences should be attended to.

Appeal from a decision of Romer, J. (reported 66 Law J. Rep. Chanc. 143; W. N. (1896) 179).

H. was the owner of freehold land, and his agent wrote to S. offering to sell the land. S. accepted the offer, but added, "I should like to know from what time H. wishes the purchase to date"; and also, "You do not mention the fences, but I should be obliged if they may be seen to at once, as they really need attention."

Romer, J., held that the letter of S. was a complete acceptance of the offer, and from this decision there was an appeal.

Their Lordships dismissed the appeal. They said that the question as to the date of the purchase did not negative the inference that the completion was to be within a reasonable time, there being no date fixed; and there was nothing in that or in the remark as to the fences which introduced a new term, or detracted in any way from the distinct acceptance contained in the former part of the letter.

SUPERIOR COURT OF BALTIMORE CITY.

17 February, 1897.

Before RITCHIE, J., and a Jury.

ANNIE O. CROZIER v. THE HOME LIFE INSURANCE CO.

Life insurance—Suicide—Onus—Admissions in proofs.

Under a condition which provides that "self-destruction" will render the policy void, the assured will be entitled to recover unless the self-destruction was intentional.

Where it appears that death was the result of accident or suicide, and there is no evidence to show which was the cause, or where, from all the evidence, the cause of death may be equally referred either to accident or design, the presumption of law is that death was accidental.

The onus of suicide or intentional self-destruction is on the defendant.

Statements in the proofs of death are evidence of admissions or declarations as against the assured.

Rulings of Ritchie, J., on the prayers in the cause.

There is but one question for the jury to pass upon, and I think the case can be submitted in a much simpler manner than it is proposed to do by the counsel on either side. So far as the right to recover on this policy is concerned, I will, therefore, reject all the prayers on both sides, and will give the jury one brief instruction, which, I think, states the law to which each side is entitled.

As I have said, there is but one question in the case. There is no controversy over any fact material to the right of the plaintiff to recover, except as to how Wm. W. Crozier, the insured, shot himself. Did he do it accidentally, or did he do it intentionally? If he did it accidentally, then the plaintiff is entitled to recover; if he did it intentionally, then the plaintiff is not entitled to recover. There is no evidence of insanity in the case, and the only question for the jury is, did Crozier shoot himself intentionally, or not?

The defendant, however, contends that the proofs of death contain an admission by the plaintiff that the shooting was intentional, and that, therefore, the court should instruct the jury to find a verdict in its favor.

The policy sued on was issued on the condition, among others, "that for two years after the date of issue of the policy * * * self-destruction, while sane or insane * * * will render the policy void."

The plaintiff proved by uncontradicted testimony the issue of the policy, payment of premium, death of the insured during the life of the policy, and the due delivery of proper proofs of death. Proof of these facts, uncoupled with anything that qualified their force, would make out a *prima facie* case in favor of the plaintiff. The proofs of death, however, contain the statement that the insured "shot himself with a pistol," and at the close of the plaintiff's case (death having occurred within the two years), the defendant asked for a verdict in its favor on the ground that this statement was an admission that the assured had committed suicide.

While the proofs of death, as against the company, are evidence only of the fact of a compliance with the condition of the policy, any statements therein, as against the assured, are evidence of admissions or declarations: 46 Md. 313; 22 Wall. 32; 142 U.S. 691; 2 Biddle, Sec. 1013; Bliss. Sec. 265; 15 So. R. 388.

The defendant, therefore, had a right to avail itself of the admission that the insured had "shot himself," and, there being at that stage of the case no evidence of the circumstances under which his death occurred, nor any evidence to qualify or counteract this admission, the defendant would have been entitled to a verdict, if he "shot himself," necessarily meant suicide. But, standing alone, such is not its meaning. This admission might mean "shot himself" accidentally just as well as "shot himself" intentionally, and its import must therefore be determined by the presumption which applies to such a case.

Where it appears that death was the result of accident or suicide, and there is no evidence to show which was the cause, or where from all the evidence the cause of death may be equally referred either to accident or design, the presumption of law is that death was accidental: Bliss. Sec. 367; Lawson, Presumptive Ev., 192; 57 N. Y. 52; 57 Ill. App. 315; 15 So. R. 388; 28 S. W. R. 837; Ency. 45.

The presumption, therefore, from the mere admission that the insured "shot himself," is that the self-destruction was accidental, and, if accidental, the plaintiff is entitled to recover. Authorities *supra* and 42 Md. 417; 93 U. S. 287; 2 Biddle, Sec. 831. A *prima facie* case was therefore made out by the plaintiff. The twenty-first answer of Dr. Slater as to the manner of the shooting, taken in connection with his previous answers, amounts to

nothing more than the statement just considered, and it is also manifest that he had no personal knowledge on the subject.

The plaintiff having thus made out a *prima facie* case, the *onus* of proving the defence of suicide, or intentional self-destruction, was on the company: Bliss. Sec. 367; 142 U.S. 691; 71 Hun, 146; 28 S.W.R. 837; 15 So. R. 388.

The only thing, therefore, for the consideration of the jury (the plaintiff having offered no evidence in rebuttal as to the circumstances under which the insured shot himself), is the sufficiency of the evidence offered by defendant to prove suicide, and the *onus* of proving suicide being, as stated, on the defendant, the plaintiff is entitled to recover unless the jury believe that he shot himself intentionally; if the jury believe that he shot himself intentionally, then the plaintiff is not entitled to recover, and I will give an instruction to this effect.

RECENT U.S. DECISIONS.

GAS EXPLOSIONS.—The explosion of a public sewer on account of the formation of gases from crude petroleum, which was turned into it by city authorities after escaping from oil works, is held, in *Fuchs v. St. Louis* (Mo.), 34 L. R. A. 118, to render the city liable for the damage, if the city did not exercise due care to avoid such explosion.

CARRIERS OF PASSENGERS—LIABILITY AS TO BAGGAGE.—The omission of a passenger to call for her trunk until the day following that of arrival at her destination is, under ordinary circumstances, unreasonable, and therefore the carrier ceases to be responsible as such, and is liable merely as a warehouseman. (*Wiegand v. Central R. Co. of New Jersey*, U.S.C.C. Penn., 75 Fed. Rep. 370.)

TELEGRAPH COMPANY.—A rule of a telegraph company not to deliver messages outside of a half-mile limit is held, in *Western Union Telegraph Co. v. Robinson* (Tenn.) 34 L.R.A. 431, insufficient to excuse a delay in delivering a message sent to a small town a few miles away, summoning a minister of the gospel to a person near death, when the rule was not known to the sender and was not known to the agent, who received the message about dark, stating that it could be delivered that night. This case has a note reviewing the decisions on the limit for the delivery of telegrams.

RESPONSIBILITY.—A new application of settled principles to a case without precedent is made in *Kujek v. Goldman* (N. Y.), 34 L. R. A. 156, which holds that a man who induces another to marry a girl by false representations that she is virtuous when in fact she has been seduced by himself, and has become pregnant, is liable for damages in an action by the husband for the fraud.

ARSON.—A man who burns his own house is held, in *People v. De Winton* (Cal.), 33 L. R. A. 374, to be guilty of arson only when some part of the house at least was in the possession of another person. The California statutes are said not to have changed the common law on this point.

RESPONSIBILITY OF CITY TREASURER.—Forcible robbery of a city treasurer is held, in *Healdsburg v. Mulligan* (Cal.), 33 L. R. A. 461, to be a defence to an action upon his bond, where the constitution and laws of the State make him a bailee and not a debtor.

DECEIT.—The purchase of goods on credit, intending not to pay for them, is held, in *Swift v. Rounds* (R. I.), 33 L. R. A. 561, to render the purchaser liable to an action for deceit.

OFFERING BRIBE TO JUROR.—An indictment for the crime of offering a bribe to a juror is held insufficient, in *State v. Howard* (Minn.) 34 L. R. A. 178, because it failed to aver explicitly the knowledge of the accused that the person bribed was a juror, or to allege anything to show that the money offered was of value, but merely alleged that he offered "a bribe and money of value."

CONTRACT—BREACH.—Taking stock in or helping to organize or manage a corporation formed to carry on a business after one has agreed on the sale of such a business not to continue it in that locality, is held, in *Kramer v. Old* (N. C.), 34 L. R. A. 389, to constitute a breach of the contract.

RAILWAY—DUTY TO PASSENGER.—The duty to awaken a passenger in a sleeping car in time to permit preparation for changing cars in a suitable and decent manner is affirmed in *McKeon v. Chicago M. & St. P. R. Co.* (Wis.) 35 L. R. A. 352. The fact that there is no stipulation for this in the contract of carriage is held insufficient to relieve the carrier of the duty to awaken the passenger before reaching the station, or else to hold the train long enough to permit the change of cars to be made suitably and decently.

MASTER AND SERVANT.—The exposure of a servant to a contagious or infectious disease, of which the servant is ignorant and unable to know by the exercise of ordinary care, when the master knows, or ought to know the danger, and does not warn the servant, is held, in *Kliegel v. Aitken*, (Wis.) 35 L.R.A. 249, to render the master liable if the servant contracts the disease.

CRIMINAL LAW.—The dismissal of a jury in a criminal case, merely because a witness is absent, is held in *State v. Richardson*, (S.C.), 35 L.R.A. 238, to amount to an acquittal, which will make any subsequent attempt to prosecute the prisoner a second jeopardy.

CARRIER—STATE POWERS.—A State statute prohibiting a carrier from contracting for an exemption from the negligence of a connecting carrier, when the first carrier undertakes to transport property to a point beyond its own route, is held, in *McCann v. Eddy* (Mo.), 35 L.R.A. 110, to be valid, and not to amount to an unconstitutional regulation of interstate commerce.

PROMISSORY NOTE.—A promissory note signed by a person who is *non compos mentis*, though negotiable in form, is held, in *Hosler v. Beard* (Ohio), 35 L.R.A. 161, to be subject to the same defences when in the hands of a *bona fide* holder that it was subject to in the hands of the payee. The other authorities on the rights of *bona fide* holders of the notes of insane persons are found in the annotation to the case.

CITY CONTROL OVER STREETS.—The determination of a city council that trees growing on a sidewalk are an obstruction to travel is held, in *Vanderhurst v. Tholcke* (Cal.), 35 L.R.A. 267, to be conclusive, where the charter gives the council general control of the streets, with power to define, prevent, and remove nuisances.

GENERAL NOTES.

ROBBERY OF A JUDGE.—Judge Addison, Q.C., a county court judge, was the victim recently of a daring robbery in open daylight. While the judge was walking down Westminster Bridge Road, in the direction of the bridge, his watch and chain, valued at fifty guineas, were suddenly snatched by a man who immediately ran off. The judge followed, and a constable appearing the culprit was seized.

THE INNS OF COURT.—Of the forty-nine students who became barristers on May 12, twenty-six, or more than half, belong to the Inner Temple, eleven to the Middle Temple, six to Lincoln's Inn, and a like number to Gray's Inn.

INJURY TO THE NERVOUS SYSTEM.—In an action tried before the Lord Chief Justice the other day, in which a railway company was sued for damages for personal injuries, the chief medical witness stated that the plaintiff's nervous system was injured, and would probably never improve. "Isn't it true that litigation is bad for the nerves?" asked Mr. Darling, Q.C., in cross-examination. The doctor admitted that it was. "And it is probable that his nerves will get stronger after this litigation is over?" The doctor was less ready to admit this. The Lord Chief Justice came to his assistance by suggesting that the answer would depend upon the verdict of the jury. "So, doctor, you prescribe damages as a cure?" was Mr. Darling's final question, and the answer was a smile.

ATTENDANCE OF THE JUDGES AT THE HOUSE OF COMMONS.—A precedent for Mr. Gibson Bowles' motion to require the attendance of the judges at the House of Commons was established in 1689, when it was ordered "that Sir William Williams and Mr. Windham, members of this House, do acquaint the Lord Chief Baron Atkins, Mr. Justice Dolben, Mr. Justice Gregory, Mr. Justice Powell, and Mr. Baron Neville, that the House doth desire to speak with them to-morrow morning." On the following day, pursuant to this order, the Lord Chief Baron and his colleagues attended at the door, and were called in to state why they had been displaced from being judges. "There was," says the *Commons Journal*, "a chair ordered to be set for them within the bar, and they were severally called in and stood behind the same, the Serjeant with his mace standing by on the right hand, and being severally asked why they were displaced from being judges they severally gave an account thereof to the House." In this connection it is interesting to note, says the *Times*, that, although several of the judges attended, one chair only was set for them, as they were not to sit down in it. "The difference between the mode of reception of peers and judges has been that the Speaker informs the peer 'that there is a chair for his lordship to repose himself in'; to the judge the Speaker says, 'that there is a chair to repose himself upon'—i.e. as explained by the usage, for the person to rest with his hand on the back of

it." It is stated in "Grey's Debates," vol. vii, p. 378, that when Lord Chief Justice North was called before the House of Commons on October 28, 1680, he "sat down" in the chair prepared for him, but Hatsell questions the accuracy of this.—*Law Journal*.

PUBLICATIONS OF THE SELDEN SOCIETY.—The Selden Society is about to issue the eleventh volume of its publications, "Select Pleas in the Court of Admiralty, vol. ii., A. D. 1547-1602," edited by Mr. Reginald G. Marsden. It contains about two hundred cases and documents of the reigns of Edward VI., Mary, and Elizabeth, when the jurisdiction of the Admiralty was at its zenith, and a summary of all the cases dealt with in the period. It also illustrates the foreign policy of Elizabeth, the Armada, marine insurance in 1548, &c. The introduction treats of the history of the Court between the fourteenth and eighteenth centuries, gathered from original documents, including the later records, many of which are State papers not calendared in "S. P. Dom." or, it is believed, to be found or referred to elsewhere.

"UNLOADED" GUNS.—The lamentable death at Hoxton at once illustrates the penetrative power of the new Lee-Metford rifle and raises again the question of the criminal liability of those who play with firearms without taking proper steps to see whether they are loaded or not. On March 6 a Mrs. Nevard was in her shop in Hoxton Street when she was killed by being shot through the head. On inquiry it was discovered that a volunteer named Lowrie had gone into the bar of a club in Hoxton Square with a Lee-Metford rifle. He appears to have had some instruction in its use, and was showing it about as a novelty. Another person present had a cartridge, which was put into the rifle, it is said, in the belief that it was blank; and the rifle in some way was fired off. The bullet went through a ticket-box, through a partially open door, a window, the head of the deceased, a wooden partition, and a piece of cat's meat. The coroner is investigating the exact circumstances of the firing, and Lowrie is under remand on a charge of manslaughter; and it is to be hoped that the result of the two inquiries will be the laying down of some definite and comprehensible rules of responsibility for persons playing with firearms.—*Law Journal* (London).

OARSMEN IN THE COURT OF APPEAL.—At the suggestion of a number of prominent university oarsmen, an invitation, says the *Times*, has been given to Lord Esher (Master of the Rolls), Lord Macnaghten, Lord Justice Smith, and Lord Justice Chitty, to a dinner in celebration of the remarkable fact that at the present time no fewer than four appellate judges, including one-half of the Court of Appeal, are old rowing Blues. The invitation has been cordially accepted by the four distinguished guests, and the dinner will take place at the Trocadero Restaurant on Monday, May 31.

A FAIR DIVISION.—An amusing story as to the way in which Acts of Parliament are drafted and amended was told by the Lord Chancellor in speaking in the City on the codification of the statutes. An Act was once passed which imposed a pecuniary penalty for the falsification of parish registers, half of which was to go to the informer, and the other half to the Crown. In a subsequent and amending Act this was changed to transportation for seven years, but the remaining words were not altered, so that half the transportation was to go to the informer, and the other half to the Crown.

WRITTEN INSTRUCTIONS TO JURIES.—The *London Law Magazine and Review*, in referring to legal matters in the United States, says: "At the last meeting of the Bar Association of the United States, many distinguished speakers advocated the abolition of written instructions to juries, a practice which very seldom obtains in England, although it would appear to be common in the United States."

MISDIRECTED ENERGY.—For eavesdropping in the court consultation room of the court house at Frankfort, Ky., Frank M. Robbins, a reporter of the Cincinnati (O.) *Times Star*, was arraigned for contempt of court, and was fined and sentenced to thirty days in jail. It was shown that Robbins in this manner heard the decision of the court in a murder case, and by means of flag signals to his associate, succeeded in conveying the decision to his paper an hour in advance of its announcement by the court.

BREAD ACTS.—The provisions of the London Bread Act (3 Geo. IV. c. cvi.), which forbid Sunday baking, work somewhat hardly as to Jewish bakers, who in obedience to their own faith may not bake on their own Sabbath, and by the law of a Christian land must not bake on Sunday. A good many prosecutions have been successfully instituted during this month.

MANSLAUGHTER BY NEGLIGENCE.—A coroner's jury at Menheniot, after inquiry into the fatal accident on the Cornwall Railway, caused by the fall of a staging erected at Menheniot Bridge on February 10, returned a verdict of manslaughter against a foreman and ganger intrusted with the erection and supervision of the staging. This verdict rests on a different basis from that recently quoted by the High Court, inasmuch as there was evidence before the jury to indicate the existence of personal and individual duty on the foreman and ganger, and not the mere constructive corporate liability suggested in the Gloucestershire quarry case.

SINGULAR DISPOSITION OF JUDICIAL ROBES.—The death of Lady Bowen, widow of Lord Justice Bowen, occurred recently. Her shroud was made of Lord Bowen's judicial robes.

THE BASTARDY LAWS.—On December 31 a curious point was raised before Mr. Rose at the West London Police Court. A bastardy order had been made and considerable arrears had accrued when the man, who was married, died, leaving his wife in possession of the estate. The mother of the child applied for an order for recovery of the arrears, but the magistrate held that the order could not be enforced against the estate, and that the arrears could not be recovered. This is in accordance with the statement in "Martin on Maintenance and Bastardy" (2nd edit.), p. 100, and with the rule that where a new statutory right is given, the statutory remedy given for its violation is the only remedy. These orders are in a curious position as civil debts enforceable by special summary remedies. The acceptance of a composition, or scheme of arrangement, or discharge under a bankruptcy does not release the putative father from liability under such an order unless a special order of the Bankruptcy Court is made (Bankruptcy Act, 1890, ss. 3, 12, 10); nor can, it would seem, any receiving order be made on the debt created by a bastardy order, so that the civil remedy is peculiar and personal.—*Law Journal*.

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SUPREME COURT OF CANADA.

OTTAWA, 1st May, 1897.

Quebec]

LAMBE V. ARMSTRONG.

Sale by sheriff—Folle enchère—Re-sale for false bidding—C.C. P. 690 et seq.—Questions of practice—Appeal—C.C. P. 688—Privileges and hypothecs—Sheriff's deed—Registration of—Absolute nullity—Rectification of slight errors in judgment—Duty of appellate court.

Questions of practice raised on appeal may be taken into consideration by the Supreme Court of Canada, when the decision of such questions involves substantial rights in litigation or might have the effect of causing grave injustice.

Part of lands seized by the sheriff had been withdrawn before sale, but on proceedings for *folle enchère* it was ordered that the property described in the *procès-verbal* of seizure should be re-sold, no reference being made to the part withdrawn. On appeal, the Court of Queen's Bench (Q.R., 6 Q.B. 52) reversed the order on the ground that it directed a re-sale of property which had not been sold, and further because an apparently regular sheriff's deed of the lands actually sold had been duly registered, and had not been annulled by the order for re-sale, or prior to the proceedings for *folle enchère*.

Held, that the Court of Queen's Bench should not have set

aside the order, but should have reformed it by rectifying the error. Where a sheriff's deed has issued improperly and without authority it must be treated as an absolute nullity, notwithstanding that it has been registered and may appear upon its face to have been regularly issued, and in such a case it is not necessary to have it annulled upon taking proceedings for *folle enchère*.

Appeal allowed with costs.

Macmaster, Q. C., and *Stephens, Q. C.*, for the appellant.

Morgan, for the respondent.

1st May, 1897.

Quebec.]

LA VILLE DE CHICOUTIMI v. LÉGARÉ.

Municipal corporation—Waterworks—New works—Extension of works—Repairs—By-law—Resolution—Agreement in writing—Written contract—Highways and streets—R. S. Q. Art. 4485—C. C. P. 1033a.

By a resolution of the council of the town of Chicoutimi, on the 9th October, 1890, based upon an application previously made by him, L. obtained permission to construct waterworks in the town and to lay the necessary pipes in the streets wherever he thought proper, taking his water supply from the River Chicoutimi at whatever point might be convenient for his purposes, upon condition that the works should be commenced within a certain time and completed in the year 1892. He constructed a system of waterworks and had it in operation within the time prescribed, but the system proving insufficient a company was formed in 1895 under the provisions of R. S. Q. Art. 4485, and given authority by by-law to furnish a proper water supply to the town, whereupon L. attempted to perfect his system, to alter the position of the pipes, to construct a reservoir, and to make new excavations in the streets for these purposes without receiving any further authority from the council.

Held, (Gwynne, J., dissenting) reversing the judgment appealed from (Q. R., 5 Q. B. 542) that these were not merely necessary repairs, but new works, actually part of the system required to be completed during the year 1892, and which after that date could not be proceeded with except upon further permission obtained in the usual manner from the council of the town.

That the resolution and the application upon which it was founded constituted a "contract in writing and a written agreement" within the meaning of article 1033a of the Code of Civil Procedure of Lower Canada, and violation of its conditions was a sufficient ground for injunction to restrain the construction of new works.

Appeal allowed with costs.

Geoffrion, Q.C., and *Belleau, Q.C.*, for the appellants.

Stuart, Q.C., for the respondent.

1st May, 1897.

Quebec]

ROBIN v. DUGUAY.

Will—Construction of—Donation — Substitution — Partition, per stirpes or per capita—Usufruct—Alimentary allowance—Accretion between legatees.

The late Joseph Rochon made his will in 1852, by which he devised to his two sisters the usufruct of all his estate and the property therein to his children, naming Pierre Dupras, his uncle, as his testamentary executor, and directing that his estate should be realized and the proceeds invested accordingly to the executor's judgment, adding to these directions the words, "enfin placer la masse liquide de ma succession à intérêt ou autrement, de la manière qu'il croira le plus avantageux, pour en fournir les revenus à mes dites sœurs et conserver les fonds pour leurs enfants," and providing that these legacies should be considered as an alimentary allowance and should be non-transferable and exempt from seizure. By a codicil in 1890 he appointed a nephew as his testamentary executor in the place of the uncle, who had died, and declared : " Il sera de plus l'administrateur de mes dits biens jusqu'au décès de mes deux sœurs usufruitières, nommées dans mon dit testament, et jusqu'au partage définitif de mes biens entre mes héritiers propriétaires, et il aura les pouvoirs qu'avait le dit Pierre Dupras dans mon dit testament."

Held (affirming the judgment of the Court of Queen's Bench, Q.R., 5 Q.B. 277) Gwynne, J., dissenting, that the testamentary dispositions thus made did not create a substitution, but constituted merely a devise of the usufruct by the testator to his two

sisters, and of the estate (subject to the usufruct) to their children, which took effect at the death of the testator. That the charge of preserving the estate—"conserver les fonds"—imposed upon the testamentary executor, could not be construed as imposing the same obligation upon the sisters who were excluded from the administration, or as having, by that term, given them the property subject to the charge that it should be handed over to the children at their decease, or as being a modification of the preceding clause of the will by which the property was devised to the children directly, subject to the usufruct. That the property thus devised was subject to partition between the children *per capita* and not *per stirpes*.

Appeal dismissed with costs.

Robidoux, Q.C., for the appellant.

A. Geoffrion, for the respondent.

12th May, 1897.

Quebec]

CITIZENS LIGHT & POWER CO. v. PARENT.

Appeal from Court of Review—Appeal to Privy Council—Appealable amount—54 & 55 V. (D.) ch. 25, s. 3, ss. 3 & 4—C.S.L.C. ch. 77, s. 25—C.C.P. Arts. 1115, 1178; R.S.Q. Art. 2311.

Notwithstanding that by the jurisprudence of the Judicial Committee of the Privy Council, where the right of appeal from decisions of the Courts of Lower Canada depends upon the amount in controversy exceeding five hundred pounds sterling, the measure of value for determining such right is the amount recovered in the action, yet in appeals to the Supreme Court of Canada from the Court of Review (which by 54 & 55 Vic., ch. 25, sec. 3, ss. 3, must be appealable to the Judicial Committee of the Privy Council), the amount by which the right of appeal is to be determined is that demanded and not recovered if they are different, as provided by sub-section 4 of the third section of the said act, and by R. S. Q. art. 2311.

Motion refused with costs.

R. C. Smith, for the appellant.

Charbonneau for the respondent.

1st May, 1897.

Quebec]

DUROCHER v. DUROCHER.

Evidence—Judicial admissions—Nullified instruments—Cadastral Plans and official books of reference—Compromise—"Transaction"—Estoppel—C.C. arts. 311 and 1243-1245—C.C.P. Arts. 221-225.

A will, in favour of the husband of the testatrix, was set aside in an action by the heir at law and declared by the judgment to be *un acte faux*, and therefore to be null and of no effect. In a subsequent petitory action between the same parties,

Held, Girouard, J., dissenting, that the judgment declaring the will *faux* was not evidence of admission of the title of the heir at law, by reason of anything the devisee had done in respect of the will, first, because, the will having been annulled was for all purposes unavailable, and, secondly, because the declaration of *faux*, contained in the judgment, did not show any such admission.

The constructive admission of a fact resulting from a default to answer interrogatories upon articulated facts recorded under C.C.P. Art. 225, cannot be invoked as a judicial admission, in a subsequent action of a different nature between the same parties. Statements entered upon cadastral plans and official books of reference made by public officials and filed in the lands registration offices, in virtue of the provisions of the Civil Code of Lower Canada, do not in any way bind persons who were not cognisant thereof at the time the entries were made.

A deed was entered into by the parties to a suit in order to effect a compromise of family disputes and prevent litigation, but failed to attain its end, and was annulled and set aside by order of the Court as being in contravention of Article 311 of the Civil Code of Lower Canada.

Held, Girouard, J., dissenting, that upon the nullification of the deed no allegation contained in it could subsist even as an admission.

The doctrine of estoppel by deed prevailing under the law of England does not exist under the French law in force in the Province of Quebec or by virtue of the Criminal Code. (See Q. R., 5 Q. B. 458).

1st May, 1897.

Nova Scotia.]

TEMPLE v. THE ATTORNEY GENERAL OF NOVA SCOTIA.

*Mines and minerals—Lease of mining areas—Rental agreement—
Payment of rent—Forfeiture—R.S.N.S. 5 ser., c. 7—52 V., ch.
23 (N.S.)*

By R. S. N. S., 5 ser., chap. 7, the lessee of mining areas in Nova Scotia was obliged to perform a certain amount of work thereon each year on pain of forfeiture of his lease which, however, could only be effected through certain formalities. By an amendment in 1889, (52 Vic., ch. 23) the lessee is permitted to pay in advance an annual rental in lieu of work, and by sub-section (c) the owner of any leased area may, by duplicate agreement in writing with the Commissioner of Mines, avail himself of the provisions for such annual payment, and "such advance payments shall be construed to commence from the nearest recurring anniversary of the date of the lease." By sec. 7, all leases were to contain the provisions of the act respecting payment of rental and its refund in certain cases, and by section 8 said section 7 was to come into force in two months after the passing of the act.

Before the act of 1889 was passed a lease was issued to E, dated June 10th, 1889, for twenty-one years from May 21st, 1889. On June 1st, 1891, a rental agreement under the amending act was executed under which E. paid the rent for his mining areas for three years, the last payment being in May, 1893. On May 22nd, 1894, the Commissioner declared the lease forfeited for non-payment of rent for the following year, and issued a prospecting license to T., for the same areas. E. tendered the year's rent on June 29th, 1894, and an action was afterwards taken by the Attorney General, a relative of E., to set aside said license as having been illegally and improvidently granted.

Held, affirming the judgment of the Supreme Court of Nova Scotia in such action, that the phrase "nearest recurring anniversary of the date of the lease" in sub-section (c) of sec. 1, Act of 1889, is equivalent to "next or next ensuing anniversary" and the lease being dated on June 10th, no rent for 1894 was due on May 22nd of that year, at which date the lease was declared forfeited, and E's tender on June 9th was in time. *Attorney General v. Sheraton*, (28 N. S. Rep 492) approved and followed.

Held, further, that though the amending act provided for forfeiture without prior formalities of a lease in case of non-payment of rent, such provision did not apply to leases existing when the act was passed, in cases where the holders executed the agreement to pay rent thereunder in lieu of rent. The forfeiture of E.'s lease was, therefore, void for want of the formalities prescribed by the original act.

W. B. A. Ritchie, Q.C., and Congdon, for the appellants.

Russell, Q.C., for the respondent.

RECENT ONTARIO DECISIONS.

Libel—Mercantile agency—Confidential report—False information—Privilege.

A mercantile agency is not liable in damages for false information as to a trader given in good faith to a subscriber making inquiries, the information having been obtained by the mercantile agency from a person apparently well qualified to give it, and there being nothing to make them in any way doubt its correctness. Judgment of Boyd, C., 28 O.R. 21, reversed. *Robinson v. Dun*, Court of Appeal, 11 May, 1897.

Promissory note—Alteration after maturity—Signature by new maker—Discharge of accommodation maker.

A promissory note made by two persons, one signing for the accommodation of the other, was, after maturity, signed by a third person. *Held*, on the evidence, that this third person signed as an additional maker, and that there was, therefore, a material alteration of the note, discharging the accommodation maker. Judgment of Boyd, C., 28 O.R. 175, reversed. *Carrique v. Beaty*, Court of Appeal, 18 May, 1897.

Fire—Negligence—Clearing land—Setting out fire—Period of year—Liability.

In the month of August the defendant set out fire on his land for the purpose of clearing it. This fire continued to burn till October, when, in consequence of a very high wind, sparks were carried to the plaintiff's land, and set fire to some ties and posts stored thereon.

Held, that the question of the defendant's liability and negli-

gence should be determined having regard to the circumstances existing in October and not to those existing in August. Judgment of Street, J., reversed. *Beaton v. Springer*, Court of Appeal, 12 January, 1897.

Municipal corporations—Highways—Nuisance—Obstruction—Untravelled portion of highway.

A municipal corporation is not responsible for damages resulting from a horse taking fright at railway ties piled, without the knowledge or authority of the corporation, on the untravelled portion of the highway, but the person piling the ties on the highway without authority is responsible. Judgment of Meredith, J., reversed in part. *O'Neill v. Township of Windham*, Court of Appeal, 11 May, 1897.

Contract—Employer's liability policy—Condition—Construction—Conduct of employer.

An appeal by the plaintiffs from the judgment of Rose, J., at the trial at Hamilton, dismissing the action, which was brought by the firm of Talbot, Cockcroft & Harvey, who were carpet manufacturers at Elora, and by their assignee for the benefit of creditors, to recover upon a policy of insurance against accidents in their factory. An employee in the factory had his fingers cut off by a machine, and brought an action against the plaintiffs for compensation, which action was defended by the present defendants, and recovered \$1,200 and costs, which the plaintiffs in this action sought to recover against the insurers. The defence was mainly based upon a condition of the policy that "the employer shall, at the cost of the company, render them every assistance in his power in carrying on any suit which they shall undertake to defend on his behalf." *Held*, that the implication from the condition was that the employers should not assist the opposite side, and the evidence showed that one of the plaintiffs had assisted the other side, and in view of the case of *Wythe v. Manufacturers Ins. Co.*, 26 O.R. 153, the Court should not interfere to assist the plaintiffs. The appeal was dismissed with costs. —*Talbot v. London Guarantee and Accident Company*, High Court of Justice, 13 May, 1897.

Constitutional law—Railways—Restrictions under provincial charter against crossing at grade—Ultra vires—Dominion Railway Act 1888, ss. 21, 306, 307—Jurisdiction of Railway Committee.

The defendants were incorporated to construct an electric

railway, crossing the plaintiffs' line at Burlington, but forbidden by their charter to cross the line of any steam railway at grade. A dispute arising between the plaintiffs and defendants as to the manner in which the defendants should cross the plaintiff's line, the matter was brought before the Railway Committee of the Privy Council, who determined that the restriction in the defendant's Act of Incorporation forbidding them to cross at grade was *ultra vires*, and not binding on the defendants, and made an order allowing the latter to cross the plaintiffs' line at grade.—*Held*, that, subject to the right of appeal to the Governor-General or of reference to the Supreme Court of Canada, the decision of the Railway Committee was, under s. 21 of the Railway Act of 1888, 51 V., c. 29 (D.), final, for ss. 306 and 307 of that Act brought the defendant's line under the legislative authority of Parliament so soon as they proposed to cross the plaintiffs' line.—*Grand Trunk Ry. Co. v. Hamilton Radial Electric Ry. Co.*, Street, J., 5 May, 1897.

A NEW STUDY OF DISEASED MEMORY.

A certain class of men who use spirits and narcotics, and possibly others who do not take drugs, manifest two distinct memory defects which may be called subjective and objective amnesia.

In one case all phenomena concerning themselves, are faintly and imperfectly registered, while all events of the surroundings and conduct of others with whom they come in contact, are most vividly impressed on the memory.

In the objective amnesia this is reversed. Their own acts, conduct and speech, are very clear, while that of others is cloudy and very obscure.

In one case the man remembers who he met and what was said, but cannot recall where he went or what he said. In the other, he can remember exactly what he said and did, but not the acts and talk of others.

This most confusing and contradictory condition is not recognized, and is practically a localized paresis of some brain section.

In subjective amnesia, the following is an illustrative case: The man is a manufacturer who remembers having met different persons, and recalls their conversation. Particularly where it has been in the nature of counsel, or the statement of facts. Or

if it was of a controversial character. He is a local politician, and the arguments of others and statements of matters are clear and can be recalled. But what he said and where he went and what his motives and reasons were for this or that is all a blank. Thus he met a rival in business, who told him many strange unexpected occurrences, and offered to join with him in a business transaction. The next day he was perplexed to know what he said to call out these statements, and why he should have called on this man. Later when he was told what he said he was astonished and chagrined.

In another case a man reported a strange robbery to the police, and next day had a vivid recollection of what was said to him, and the advice to entrap the thief, but could not recall any statement of his. When his charge was read to him, it was a blank, and apparently untrue. A man returned home after an absence of four days. He remembered a conductor on the New York Central road conversing with him on the possibility of accidents.

He remembered the clerk of the St. Denis Hotel introducing him to a gentleman, and a long conversation followed on the cider business. He remembered going to the office of the People's Line Boat and hearing matters of freight discussed.

He remembered a religious conversation on the cars in which he was strangely advised, then he recalled an angry hackman who wanted larger fare for services bringing him home. The next day all was a blank concerning his acts or conversation.

In objective amnesia. A man goes to New York, buys a bill of goods, makes some calls, visits the theatre, returns home. He cannot remember who he met nor what was said, but his own acts and conversation were clear. He can tell what he said to a travelling companion on the way to New York, and what he said to the salesman from whom he purchased the goods; the clerk of the hotel where he stopped, and all his conversation and every place he visited. The price of the goods asked is not clear, but his offer of a lower sum is vivid. His opinion of the markets and the demands of trade is remembered, but not the opinions of others. In another case a banker cannot recall anything said to him, or any special conduct of others, but what he said is clear, and he is obliged to guess at what was said to explain his memory of what he said. He must judge of the acts

and conversations of others from the recollection of his own acts and conduct. Thus he remembers denying certain statements, and defending particular theories, but he cannot recall the reasons or conversation of others which led up to this.

In these cases there is disease of the ego, and a supreme exaltation of the value and importance of all mental operations, which obscure every other state external to the mind.

Also, profound depression of the ego, associated with intense suspicion and fear of the effect of acts and events, and the opinions of others. His own personality and its activity is obscured, but the individuality of others is magnified. Memory only records events outside that bear on the life; or, on the contrary, it fails to register outside events and conversation, and shows intense activity in fixing the words and personalities of the man.

The psychology of this study will reveal minor degrees of this defect, in persons supposed to be healthy, and in transient periods of time.—*Paper read by T. D. Crothers, M.D., before the Medico-Legal Society.*

THE GUARANTEEING OF DEBENTURES.

The insurance of debentures is only one of the many ways in which the insurance principle is spreading itself over all the complex world of business, eliminating the element of risk. As applied to debentures it is new, and it yet remains to be worked out in detail; but *Finlay v. The Mexican Investment Corporation* indicates some of the problems which the Courts will have to solve. The debentures in that case were to mature on November 4, 1895, and the policy which the debenture-holder effected guaranteed payment of the principal moneys if default was made by the debtors for more than three calendar months after that date. The policy also provided, by one of the conditions, that the assured was not, without the consent of the guarantor corporation, to assent to any arrangements modifying the rights or remedies of the assured under the debentures. Then this happened. The company found itself in difficulties, and got the trustees for the debenture-holders to call a meeting, whereat the debenture-holders, by special resolution, voted to postpone the period for payment for three years. The insured debenture-holder was no party to this proceeding, and he sued the guaran-

tor corporation on the policy. The guarantor corporation could not, of course, say that the debenture-holder had broken the condition by assenting to a modification of the contract, because he had done nothing. The position they took up (ingeniously enough) was that there had been no default; and as between the debenture-holder and the company that contention would have been good, but as between the debenture-holder and the guarantor corporation the debtors had clearly made default within the terms of the policy—so Mr. Justice Charles held. It is just such contingencies as these, indeed, that a guarantee policy is taken out to meet—to insure the debenture-holder getting his money at the stipulated date. The insurers cannot complain. They get their premiums and the salvage—that is, they are surrogated to all the rights of the debenture-holder—and they must take the burden with the benefit.—*Law Journal (London)*.

INJUNCTIONS AND CONTEMPT OF COURT.

When will people begin to learn that trifling with an injunction is an expensive and dangerous form of amusement? At the best they will have to pay costs; and they run no small risk in addition of finding themselves in Holloway. It is quite a mistaken notion to suppose that a man can safely disregard an injunction because he is not a party to the action in which it was granted, or because he is not expressly named in the order or otherwise included in it. He need not have been present when the injunction was made, or have seen the order itself or a copy of it; as long as he knows of its effect, he disobeys it at his peril. For, as appears from the recent decision of the Court of Appeal in *Seaward v. Paterson*, when a man is committed on the ground that he has aided and abetted some one else in a breach of an injunction, the jurisdiction arises from the fact that it is not for the public benefit that the course of justice should be obstructed. Moreover, such a man is clearly guilty of contempt. One of the leading cases on the subject is *Lord Wellesley v. The Earl of Mornington*, 11 Beav. 180, which, curiously enough, does not seem to be noticed in Mr. Oswald's Treatise on "Contempt of Court." There Lord Mornington having been restrained from cutting timber by an injunction which did not extend to his servants and agents, one Batley, his agent, cut timber in breach of the injunction; and Lord Langdale held that Batley might be committed

for the contempt though not for the breach. In *Avery v. Andrews*, 51 Law J. Rep. Chanc. 414, Mr. Justice Kay observed: "If anybody, though not a person actually named in the injunction, chooses to step into the place of the man who was named, and to do the act which he was enjoined from doing, he has committed a very gross contempt of this Court." And again: "If people are so foolish as to imagine that they can in this way by a ruse avoid and get rid of an order made by this Court, it is time that this delusion should be put an end to." That was a case in which trustees of a friendly society, who had been restrained by injunction from distributing certain funds among the members, retired from the trusteeship and new trustees were appointed, who being aware of the injunction, proceeded to distribute the funds. It is probable that their "delusion" was "put an end to"; for Mr. Justice Kay committed both sets of trustees. —*Ib.*

COURT OF APPEAL.

LONDON, 2 April, 1897.

COBURN ET AL. V. COLLEDGE (32 L.J.)

*Solicitor—Bill of costs—Cause of action—Statute of Limitations—
Time from which statute runs.*

Appeal from the judgment of Charles, J.

The plaintiffs, who were solicitors, were retained by the defendant to do certain work for him, and on May 29, 1889, the work was completed. On June 7, 1889, the defendant left England for beyond the seas. On June 12, 1889, the plaintiffs duly delivered at the defendant's dwelling-house a signed bill of their costs, and this bill reached the defendant's hands in 1891. In 1896 the defendant returned to England, and on June 12 the plaintiffs commenced this action to recover their costs. The defendant pleaded the Statute of Limitations. The plaintiffs contended that the cause of action did not arise until the expiration of one month after the delivery of the bill of costs.

Charles, J., held that the cause of action arose when the work was completed on May 29, 1889, and as the defendant was then in England the Statute of Limitations began to run from that date. He therefore held that the action was barred, and gave judgment for the defendant.

The plaintiffs appealed.

Their Lordships (Lord Esher, M. R., Lopes, L.J., and Chitty, L.J.) dismissed the appeal, holding that the cause of action in respect of work done by a solicitor arose upon the completion of the work, and that therefore the Statute of Limitations ran from that date.

Appeal dismissed.

GENERAL NOTES.

TIME LIMIT FOR SPEECHES.—A bill has passed the Senate of Iowa limiting the time which lawyers may consume in arguing cases before juries. This is a revival of the ancient custom which compelled the advocates of Rome to measure their speeches by water-clocks. There are, it has been suggested, barristers in our Courts whose garrulous ease might well be submitted to a similar limitation, if it were not for the fact that their clients might be injured by the closure being applied before they had placed all their arguments before the jury. It is difficult to see why the time-limit should be applied only to speeches to jurors. There are counsel so richly endowed with the gifts of speech that they contrive, even in arguing before judges, to spin out the thread of their verbosity finer than the staple of their argument. There is only one way in which a judge can stop the eloquence of such an advocate. "Why," asked the late Master of the Rolls, "why was this point not raised before the judge in the Court below?" "His Lordship stopped me, m'lud," answered the fluent advocate. "How ever did he manage to do that?" inquired the Master of the Rolls, with unmistakable surprise. "By a species of pious fraud, m'lud; by pretending to be with me," was the reply.—*Law Journal*.

ADMISSIONS AND REJECTIONS.—The examinations precedent to calls to the Bar do not become easier, if we may judge from the percentage of failures to successes. Of 126 candidates who presented themselves for the English Law part of the examination, fifty-seven failed, and of these nineteen have been debarred from again attempting to pass until the autumn, and one candidate has been relegated to his studies for a year. Roman Law and Constitutional Law have not proved fatal to students to such an extent as has English Law. We wonder if the increasing difficulty in the examination will result in a race of better lawyers than those produced by the old methods. We doubt it.—*Ib.*

LEGAL ANTIQUITIES.—Few people are aware that in two countries at least laws have been passed giving women the right to propose marriage. In case of refusal to accept the hand of the suitor a heavy fine was imposed upon the unfortunate man. Among the ancient records of Scotland a searcher has recently discovered an act of Scottish parliament, passed in the year 1288, which reads as follows: "It is statut and ordaint that during the rein of his maist blissit Begeste, ilk for the yeare knowne as lepe yeare, ilk mayden layde of bothe highe and lowe estait shall hae liberte to bespeke ye man she likes, albeit he refuses to taik hir to be his lawful wyfe, he shall be mulcted in ye sum ane dundis or less, as his estat may be; except and awis gif he can make it appeare that he is betrothit ane ither woman he then shall be free." A few years later a similar law was passed in France and received the approval of the king. It is also said that before Columbus sailed on his famous voyage a similar privilege was granted to the maidens of Genoa and Florence. There is no record of any fines imposed under the Scotch law or trace of statistics of the number of spinsters who take advantage of it or the French enactment.—*The Green Bag*.

DAMNUM ABSQUE INJURIA.—In a suit brought against a railway company by a widow for the death of her husband, the defendant's counsel cross-examined the plaintiff as follows:—

Q. "Madam, Mr. X. was a good man, was he not?"

A. "Yes, a very good man."

Q. "But sickly and getting a little old?"

A. "Yes, he was a consumptive and 50 years old."

Q. "You have since married the second time?"

A. "Yes, a few days ago."

Q. "This husband is a fine looking, healthy young fellow, isn't he?"

A. "Well, yes, he is."

Q. "Now, isn't it a fact that he is a much better husband than your first one?"

A. "Well, I think he is."

Q. "Then, how are you damaged by the railroad train running over the first one?"

FEMALE LAWYERS IN THE SOUTH.—Alabama is said to be the first southern state to pass a bill permitting females to practise law.

TRADE UNIONS.—One who procures the discharge of an employee not engaged for any definite time, by threatening to terminate a contract between himself and the employer which he had a right to terminate at any time, is held, in *Raycroft v. Tayntor* (Vt.), 33 L.R.A. 225, to be not liable to an action by the employee for damages, whatever motive may have prompted him to procure the discharge.

AN INTERESTING QUESTION.—At a meeting of the Leeds Law Students' Society, held on February 8, the following subject was debated: "A., a bachelor, in 1893 promised to marry B., a spinster. A. failed to keep his promise, and in 1896 B. brought an action for breach of promise of marriage against him and obtained 500*l.* damages. The damages were never paid, and in the same year the parties were married. In the beginning of 1897, C., an antenuptial creditor of B. for 100*l.*, applied to A. for payment of that sum. A.'s solicitor replies that A. received no assets with B., and is therefore not liable. C.'s solicitor answers that A. received assets to the extent of 500*l.* Can C. successfully maintain an action against A. for the 100*l.*?" Mr. G. E. Foster opened in the affirmative, and Mr. E. N. Whitley replied in the negative. After a brief discussion, the chairman, Mr. W. H. Clarke, summed up, and there was a majority for the affirmative.

ASPIRATION AND PRACTICE.—At the farewell dinner to Sir Alfred Milner, the newly appointed Governor of Cape Colony and High Commissioner for South Africa, Mr. Asquith, Q.C., M.P., referring to the days in which Sir Alfred Milner sought to practise at the Bar, said: "We both joined, and we both aspired to practise the profession of the law. I am afraid that, in those days, at any rate, there was a good deal more aspiration than practice. But I can recall occasions on which he and I have in a gloomy mood discussed the baffling problem which constantly presents itself to ambitious youth in this country—the unaccountable want of discrimination of that which is ironically called the lower branch of the legal profession. Well, after a time, much to my regret and to that of many others, Sir Alfred Milner turned his back upon the Temple. The Northamptonshire Sessions, in which I believe upon one occasion his voice had been raised for a trifling honorarium in the interests or supposed interests of justice, knew him no more. He deviated, as so many good men have been tempted to do, into the seductive by-paths of journalism."

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CURRENT TOPICS AND CASES.

The Jubilee honors include knighthoods to three Canadian judges. In the Province of Quebec the Acting Chief Justice of the Superior Court at Montreal becomes Sir Melbourne M. Tait. Since his accession to the bench, and more particularly since his appointment to the position of Acting Chief Justice of the Superior Court, Sir Melbourne Tait has won golden opinions from the bar, who best know and are competent to appreciate the important services rendered by the Chief Justice. From a number of causes--illness and absence of some of the judges, increase of court work owing to election contestations, and litigation arising from the new electric and other corporations organized of late years, and last but not least, the augmentation of the work of the Court of Review, proceeding from the change in the law which permits appeals to be taken directly from the Court of Review to the Supreme Court,—from these and other causes, the rolls of the Superior Court and Court of Review had become abnormally congested with cases. The Acting Chief Justice applied himself with untiring energy and considerable administrative ability to remedy

this state of things, and with the co-operation of his brother judges, his efforts have been crowned with remarkable success. Some three hundred Review cases have been heard and determined within a twelvemonth, thirty-nine being pronounced on a single day, and nearly sixty within one month. The rolls of the Superior Court have also been cleared of the accumulation of cases, and the result is that it is far from uncommon to have a judgment in an ordinary contested suit within six months from the date when the cause of action arose. To Sir Melbourne Tait must be ascribed very largely this happy change in the administration of justice in Montreal, and the knighthood conferred on him on Jubilee day is a fitting acknowledgment of the great services which he has rendered while holding the office of Acting Chief Justice.

The other two judges knighted are Chief Justice Hagarty, who recently retired from the Chief Justiceship of Ontario, and Chief Justice Taylor, of Manitoba. Chief Justice Hagarty formerly declined a knighthood, but has now accepted it. It may be remarked that Canada has three out of the seven legal knighthoods bestowed.

Other honors which have fallen to members of the bar are a G. C. M. G. to the Premier of Canada, Mr. Laurier, and to the Minister of Justice, Sir Oliver Mowat, and a K. C. M. G. to Mr. Kirkpatrick, the Lieutenant-Governor of Ontario, and to Mr. L. H. Davies, Minister of Marine and Fisheries.

The bar of Montreal has lost a diligent and active member by the untimely death of Mr. O. M. Augé, Q. C., which occurred on the 22nd of June. Mr. Augé was born at Joliette about 52 years ago. He studied law in

Montreal, and was admitted to the bar in 1867. He was appointed a Q. C. in 1887. Besides attaining some prominence in his profession Mr. Augé also took a prominent part in local politics, and for some years represented the St. James division of Montreal in the provincial legislature.

The English Bar figured in a remarkable way in the Jubilee proceedings, the representatives of the profession, headed by the law officers, attending in state at St. Paul's Cathedral on Sunday, the 20th June. The Bar marched in procession from the Chapter House, around St. Paul's Churchyard, up the rows of steps in front of the Cathedral, and then to their allotted places. This is said to be the first occasion on record when there was a state attendance of the Bar at the Cathedral.

Scottish lawyers are now covetous of the distinction of Q. C., and a Scottish roll has been instituted. About a dozen members of the Faculty of Advocates have applied to be put on the roll. However, it is stated that no counsel of less than nineteen years' standing has sent in his name.

It has been proposed that the long vacation in England shall commence on the first Monday in August and terminate at the end of September. So far as considerations of weather and temperature and school terms affect the question it would certainly be more convenient to close the work of the courts in August and resume the sittings in the beginning of October. The proposed period of vacation also approximates more closely to our own vacation, where, in consequence of the greater intensity

of the heat and the general exodus from the large towns during the mid-summer months, the courts close on the 30th June and resume on the 12th September.

The Supreme Court of the United States is a hard worked tribunal. We notice, however, that Mr. Justice Harlan, one of the members of the Court, is to deliver thirty-six lectures in the summer course of the University of Virginia, during the months of July and August. Four or five law lectures per week in the vacation time does not seem much like relaxation.

COURT OF APPEAL

LONDON, 29 April, 1897.

In re THE EASTMAN PHOTOGRAPHIC MATERIALS COMPANY'S
TRADE-MARK (32 L. J.).

*Trade-mark—Descriptive word—"Solio"—Photographic paper—
Registration—Patents, Designs, and Trade-marks Act, 1888, s.
10, subs. 1 (d) (e).*

Appeal from a decision of Kekewich, J., (noted 31 L. J. N. C. 649; W. N. (1896) 158), refusing to direct the registration of the word "Solio" as a trade-mark in connection with photographic paper. The Comptroller had refused to register the word upon the ground that it indicated the character and quality of the goods, and therefore under section 10, sub-section 1 (e) of the Patents, Designs, and Trade-marks Act, 1888, it could not be registered. It appeared to be his practice not to put on the register the word "sun" or "sol" in connection with photography.

Kekewich, J., upheld the decision of the Comptroller, being of opinion that "Solio" connoted the idea of "sol" or the "sun."

The applicants appealed.

J. F. Moulton, Q.C., and D. M. Kerly, for the appeal, contended that the sub-clauses (d) and (e) of sub-section 1 of section

10 of the Act of 1888 must be read disjunctively, and that inasmuch as "Solio" was an invented word it could be registered under sub-clause (d), and it was in that case immaterial to consider whether or no it was a word having no reference to the character or quality of the goods as required by sub-clause (e).

Sir R. Webster, Q.C., (Attorney-General), and *M. Ingle Joyce*, for the respondent.

Their Lordships (Lindley, Lopes and Rigby, L. JJ.) dismissed the appeal. They said that they were bound by the decision of the Court in *In re The Farbenfabriken Application* ('*Somatose*' Case), 63 Law J. Rep. Chanc. 257; L.R. (1894) 1 Chanc. 645, and *In re Pensham's Trade-mark* ('*Mazawattee*' Case), 64 Law J. Rep. Chanc. 634; L.R. (1895) 2 Chanc. 176; and, admitting that "Solio" was an invented word, yet it was not a fit subject for registration under the Act, in respect of photographic paper, as it was a word which anyone would connect with sunlight, and, therefore, it could not be said to have no reference to the character or quality of the paper in connection with which it was intended to be used.

RECENT ONTARIO DECISIONS.

Evidence—Exposure of body to jury.

In an action to recover damages for alleged malpractice, the plaintiff is not entitled to show to the jury the part of the body in question for the purpose of enabling them to judge as to its condition. Judgment of Armour, C.J., reversed. *Laughlin v. Harvey*, Court of Appeal, 11 May, 1897.

Patent of invention—New application of old mechanical device.

The application to a new purpose of an old mechanical device is patentable, when the new application lies so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but requires thought and study. Judgment of Falconbridge, J., reversed. *Bicknell v. Peterson*, Court of Appeal, 11 May, 1897.

Slander—Privilege—Interest—Duty.

The defendant, while aiding, at his request, the owner of stolen material in his search for it, said, when what was supposed to be part of it was found in the possession of a workman employed by the defendant, that the plaintiff had stolen it. *Held*, that, both on the ground that the defendant had an interest in the search, and on the ground that it was his duty to tell his workman that the material did not belong to the person from whom he had received it, the statement was *prima facie* privileged. Judgment of MacMahon, J., reversed. *Bourgard v. Barthelmes*, Court of Appeal, 11 May, 1897.

Railways—Lands injuriously affected—Arbitration and award—51 Vic., ch. 29, ss. 90, 92, 144 (D.)—Compensation—Damages—Operation of railway.

A claimant entitled, under the Railway Act of Canada, 51 Vic. ch. 29, to compensation for injury to lands by reason of a railway, owing to alterations in the grades of streets and other structural alterations, is also, having regard to ss. 90, 92 and 144, entitled to an award of damages arising in respect of the operation of the railway, and to interest upon the amounts awarded, notwithstanding that no part of such lands has been taken for the railway. *Hammersmith etc., Ry. Co. v. Brand*, L.R., 4 H.L. 171, distinguished.—*In re Birely and T. H. & B. Ry. Co.*, High Court of Justice, Armour, C.J., 5 June, 1897.

Promissory note—Contract—Rescission—Deposit—Forfeiture.

The plaintiff, on the 18th February, 1895, agreed to sell to the defendant a timber limit for \$115,000, payable \$500 in cash, \$500 in ten days, secured by a promissory note, and the balance in thirty days. The \$500 cash was paid and the note given, but it was not paid at maturity, nor was the \$114,000 paid when due. On the 2nd May, 1895, the plaintiff wrote to the defendant rescinding the contract on account of the non-payment of the purchase money. The defendant afterwards paid \$100 on the \$500 note, and gave a new note for \$400. In an action brought upon

the new note, the defendant contended that, although he had forfeited the \$500 paid in cash, he should not forfeit the second \$500, but that it was in the same position as the \$114,000; and could not be recovered after the rescission of the contract. *Held*, that the contract had been ended by the mutual action of the parties, and the law left them where they had put themselves. Whatever money had passed from one to the other could not be recovered, nor could the note be recovered from the hands of the vendor, nor could he sue upon it to recover the amount of it from the purchaser. The contract was at an end, and all rights thereunder and remedies thereon ended therewith, except that damages for the breach of it might be sought by the vendor. The doctrine applicable to "deposits" did not apply to this subsequent payment, which was not part of the deposit. Judgment of Street, J., reversed. *Fraser v. Ryan*, Court of Appeal, 24 June, 1897.

Trade-mark—Infringement—Use of particular word in advertising.

Action by Archdale Wilson & Co., wholesale druggists at Hamilton, against The Lyman Bros. & Co. (Limited), wholesale druggists at Toronto, for an injunction restraining the defendants from imitating and infringing on the plaintiffs' trade-marks, labels, envelopes, and boxes, and from imitating and infringing upon the pads manufactured by the plaintiffs and sold under a registered trade-mark consisting of the words "Wilson's Fly Poison Pads." The defendants described their goods as "The Lyman Bros. & Co. (Limited) Lightning Fly Paper Poison." The word "pad" only appeared upon the envelopes as printed at the top, as follows: "Three pads in a package, five cents." "Six pads in a package, ten cents." The plaintiffs' contention was that the defendants should be restrained from using the word "pad" in any form upon the package. The defendants' contention was that unless the Court had the right to restrain the defendants from putting up fly paper in the form of pads, there was no right to restrain them from stating on the envelopes that there were pads inside. *Held*, that the plaintiffs were not entitled to have the defendants restrained from using the word "pads" as they did upon their envelopes. *Wilson v. Lyman*, High Court of Justice, Rose, J., 23 June, 1897.

MIDDLE NAME AND LETTER.

The persistent struggle of the middle name and letter for recognition in the law has been well nigh fruitless. Time and again the Courts have declared that the law knows but one Christian name; that the middle name and letter are immaterial; that the omission of such name or letter is not a misnomer, and that a wrong middle name or letter, being mere surplusage, might be disregarded.

In *Keane v. Meade*, 28 U.S. 1, (1830), a commission issued in the name of Richard *M.* Meade, the name of the defendant being Richard *W.* Meade. It was held that this variance did not affect the execution of the commission. Thompson, J., said: "It is said, the law knows only one Christian name, and there are adjudged cases strongly countenancing, if not fully establishing, that the entire omission of a middle letter is not a misnomer or variance * * * and if so, the middle letter is immaterial and a wrong letter may be stricken out or disregarded."

In *Dills v. Kinney*, 3 J. S. Gr. 130 (1835), Hornblower, C.J., said: "The first effort made by the defendant below was to defeat the plaintiff's action by showing that she had not sued in her true name. But they failed to establish the fact. The only witness examined on that point testified, it is true, that the plaintiff once said that her name was Margaret N. or Margaret Ann Kinney; that he had never known her, however, to use any other name than that of Margaret Kinney. If, however, the fact had been otherwise it ought not to have availed the defendant. It was sufficient if she was known as well by the name of Margaret Kinney as of Margaret N. or Margaret Ann Kinney."

To the same effect are: *Walbridge v. Kibbee*, 20 Vt. 543 (1848); *Bletch v. Johnson*, 40 Ill. 116 (1864).

In *Bowen v. Mulford*, 5 Halst. 273 (1828), however, where the summons was issued in the name of John Mulford and the state of demand was filed in the name of John *S.* Mulford, and judgment entered for the plaintiff by default, the Court, on *certiorari*, reversed the judgment, saying: "The introduction of a letter or name between the Christian and surname is very common for the purpose of distinction, and therefore, in presumption of fact, John Mulford and John *S.* Mulford are not the same, but different persons. Hence the variance was material. To sanction it might open the door to serious mischief. The defendant has

notice by the summons to answer to the suit of John Mulford, but he may be subjected to very deleterious surprise if the account of another person is exhibited and may pass into judgment against him. If, subsequent to such a judgment, either of the parties, thus uncertainly ascertained, should commence another action against the defendant, he would have to accomplish an unreasonable, if not insuperable task in sustaining a plea of former recovery; for by which of the persons is the recovery had? He whose name is entered on the justice's docket, or he who is named in the state of demand? And if in the lapse of a few years the state of demand be lost, it will become still more difficult to show that a judgment has been rendered for the demand of John S. Mulford, if, in truth, he is the actual plaintiff in this case. To all these hazards and burthens the defendant ought not to be exposed in order to save the plaintiff from the consequence of carelessness or inattention. If the defendant had appeared and gone into trial without objection, we should have been unwilling to listen to any complaint from him on this ground."

See also *Willer v. Willer*, 1 Wend. 55, to the same effect.

In *Erskine v. Davis*, 25 Ill. 226 (1861), Caton, C. J., said: "If this was a mere question of identity of a paper described in a pleading which had misstated the middle name, and which could have but one correct description, it might be a fatal misdescription."

But in *Thompson v. Lee*, 21 Ill. 242 (1859), Walker, J., said: "It is urged that there was a variance between the note declared upon and that which was read in evidence on the trial. The summons and declaration were each against James Thompson and John L. Thompson, and the note read in evidence is signed by John L. Thompson and James Thompson. But in the latter signature a letter or character resembling the letter B. or R. appears between the Christian and surname. Whether it was intended to be a letter, or a character used as the maker's mark, we conceive can make no difference, as such initial letter is not regarded as part of the name, and the law only recognizes one Christian name of a party."

In cases involving the consideration of the sufficiency of grants, tax rolls and certificates of tax sales this matter has been frequently considered.

In *Erskine v. Davis*, *supra*, Caton, C. J., said: "The objection to the execution of the deed by Margaret is that her name in the body of the deed is written Margaret A. Gittings, and her signature to the deed is Margaret S. Gittings, which is the real name of the party who owned that interest in the land, and who designed to convey the interest by the deed she thus executed. The middle name might have been wholly omitted in the body of the deed or in the signature, and the conveyance still be held good if the party actually owning the premises and intending to convey them was intended to be described in the deed and she actually signed it. In the law the middle letter of a name is no part of the name. It may be dropped and resumed or changed at pleasure, and the only inquiry is one of substance—was the deed in fact executed by the proper party?"

In *Franklin v. Talmadge*, 5 Johns. 84 (1809), an action of trespass *quare clausum fregit*, the plaintiffs produced a perfect title to William T. Robinson and others. The defendants objected to the deed on account of the variance as to the name of William Robinson named in the declaration. Plaintiffs offered to prove that one of the plaintiffs was as well known by the name of William Robinson as by the name of William T. Robinson; and that he was sometimes called by the one name and sometimes by the other. The Court ruled against the plaintiffs, who were nonsuited. The non-suit was subsequently set aside and new trial awarded, the Court saying: "The addition of the letter T. between the Christian name and surname of the plaintiff did not affect the grant, which was to be taken benignly for the grantee. It was no part of his name, for the law knows only of one Christian name, and it was perfectly competent for the plaintiff to have shown, if necessary, that one of the plaintiffs was known as well with as without the insertion of the letter T. in the middle of his name, though even that was not requisite in the first instance nor unless made necessary by testimony on the part of the defendant."

To the same effect are: *Gaines v. Dunn*, 39 U.S. 322 (1840), and *Schofield v. Jennings*, Adm'r, 68 Ind. 232 (1879), where the earlier cases are collected.

In *Van Voorhis v. Budd*, 39 Barb. 479 (1863), an action brought to recover damages for seizure and sale of a horse, the defendant justified under a tax warrant. The tax was assessed to Henry

D. Van Voorhis, while the real name of the plaintiff was *William H. Van Voorhis*. The proof upon the trial, however, showed that the plaintiff was also known in the town as Henry Van Voorhis, and that he was the person intended to be charged with the payment of the tax. Brown, J., said: "In respect to the presence of the letter D. between the words Henry and Van Voorhis upon the tax roll, it is to be regarded as surplusage upon the well known rule that the law recognizes but one Christian name. There was no proof offered to show that there was any other person in the town of Fishkill, known by the name of Henry Van Voorhis, or Henry D. Van Voorhis, to whom the charge might have referred, so that there could be no confusion and no uncertainty in regard to the person whose duty it was to pay the tax."

In *Stewart v. Colter*, 31 Minn. 385 (1884), the question was as to the sufficiency of certain tax certificates to vest titles in the plaintiff. Berry, J., said: "The objection that the certificates run to Nannie Stewart and not to Nannie W. Stewart, the name by which the plaintiff sues, is disposed of by the familiar rule that the law does not, except perhaps in special circumstances, recognize a middle name or its initial as a necessary part of a person's legal name."

The rule has also been frequently applied in criminal prosecutions.

In *Miller et al. v. People*, 34 Ill. 457 (1866), the indictment charged the robbery to have been committed on Isaac R. Randolph; it was proved that it was committed on Isaac B. Randolph, to whom the stolen money belonged. Counsel for defendant contended that although it was unnecessary to insert the initial R. in the name of the party robbed, yet, as it was inserted, and it was not proved he was as well known by the one name as the other, the variance was fatal.

Mr. Justice Breese said: "We are not of this opinion. The middle initial might, as counsel admits, have been wholly omitted in the indictment, and it would have been good if the real Randolph was intended to be named in it as the owner of the property stolen. In law the middle letter of a name is no part of the name. It may be dropped and resumed or changed at pleasure, and the only inquiry is one of substance—was he the real party robbed?"

In *State v. Black*, 2 Mo. App. 531 (1882), where John L. Black was indicted under the name of John B. Black, Blackwell, J., said: "The testimony of the notary is clear that the affidavit was made before him by the man Black on trial, and that that man made one and only one affidavit before him. The Christian or first name is called in law the proper name, and the person has but one, for middle names are not regarded in law. Nor is a middle initial regarded. * * * The change in the middle name is no variance nor does it appear how it can be at all material since the identity of the person who signed the affidavit is established."

In accord with these latter cases are:—*Choen v. State*, 52 Ill. 247 (1876); *Tucker v. People*, 122 Ill. 583 (1887), and *Ross v. State*, 116 Ind. 495 (1888).—*University Law Review* (N. Y.)

MISSING THE BOOK.

It is generally assumed that "kissing the book" is, or at any rate, was until recently, a necessary part of the legal ceremony of oath-taking. We believe this assumption to be erroneous. It would appear that the most ancient form of swearing in the Christian Church was to lay the hand upon the Gospels and say, "So help me God and these Holy Gospels." This seems to have been the usual ceremony accompanying a judicial oath until, at all events, the end of the sixteenth century; for Lord Coke says, "It is called a corporal oath because he (i.e. the witness) toucheth with his hand some part of the Holy Scriptures." It will be observed that Coke says not one word about kissing the book.

When the practice of kissing the book began is undetermined. It has been stated that this form was first prescribed as part of the ceremony of taking the oaths of allegiance and supremacy. It is interesting, and may be significant, to note that Shakespeare only once alludes to the practice of kissing the book, and on that occasion turns it into ridicule. Whatever the origin of the practice, there can be no doubt that kissing the book was the ceremony which usually accompanied the taking of an oath in an English Court of justice in the seventeenth century. But in 1657 there occurred a case, reported in 2 Siderfin 6, which for our present purpose is most important. It appears that on a jury trial Dr. Owen, Vice-Chancellor of Oxford University, being

called as a witness, refused to be sworn in the usual way by laying his right hand on the book, and afterwards kissing it; but he caused the book to be held open before him, and he raised his right hand. The jury doubting what credit they ought to give to his oath, the matter was referred to the Chief Justice, who ruled that Dr. Owen "had taken as good an oath as any other witness." And then the Chief Justice added an observation which in "Cowper's Reports," i. 390, and in "Macnally on Evidence," i. 97, and elsewhere, is misquoted as follows: "If I were to be sworn I would kiss the book." Now that is not at all what the Chief Justice said. The words in Siderfin's report are these: "*Il dit si il fuit destre Jure il voilt deponer sa main dexter sur le liver mesme.*" Thus the Chief Justice says not one word about kissing the book. In 1745, on the occasion of the trial of the rebels at Carlisle, a question arose as to the validity in English Courts of the Scottish form of oath, when Mr. Justice Gould, "finding it to be the ceremony of a particular sect," admitted a witness to swear by the form of holding up the hand; and afterwards the judges determined that the witness was legally sworn. The same question arose, and was similarly dealt with, at the Old Bailey in 1786, and again in 1788. A few years later—namely, in 1791—the same question once more cropped up, and, after considerable hesitation, Lord Kenyon determined to receive the witness's evidence under the sanction of an oath so administered by uplifted hand. But there is a case which seems at first sight to run counter to the general drift of the decisions hitherto mentioned. It is reported, from a manuscript note, by Macnally in his book on "Criminal Evidence," vol. 1, p. 97: "On the trial of the rioters stiling themselves the Protestant Association at St. Margaret's Hill, Surrey, in 1780, Sylvester, for the prisoners, desired that some Irish Roman Catholics who appeared as witnesses should be sworn on the New Testament with a crucifix or cross on it, and said that he was well informed that persons of their persuasion were so sworn in Ireland by the magistrates and in the Courts of justice. But Baron Eyre denied that such a custom could exist, and ordered the witnesses to be sworn in the usual way." The comment of the learned author on this decision is as follows: "In the assertion the counsel was right; in the denial of the custom the judge was wrong." If, as was probably the fact, the witnesses

were called on behalf of the prosecution, whilst the objection was taken by the counsel for the defence, the case is clearly differentiated from the cases mentioned above, where the objection was raised by the witness himself. Thus understood, the decision seems to amount merely to this: that if the usual form of oath is binding on the conscience of a witness, the Court will refuse to consider, on objection taken by the other side, whether another form would be more binding. It stands, therefore, much on the same ground as the decision in *The Queen's Case* (1820), 2 B. & B. 284. There it was held that a witness, having taken the oath in the usual form without objection, could afterwards be asked whether he thought it binding on his conscience; but if he said "Yes," he could not be further asked whether he considered any other form of oath more binding.

Cases similar to those mentioned above having given rise to doubts, the Act 1 & 2 Vict., c. 105 was passed. By that Act it is provided as follows: "In all cases in which an oath may lawfully be and shall have been administered to any person, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding." This statute has always been interpreted to confer a right upon a person who is willing to swear, but refuses to be sworn in the ordinary form, to have an oath administered to him in any manner which he may declare to be binding. Thus the law remained until 1888, when by the Oaths Act of that year, section 5, it was enacted as follows: "If any person to whom an oath is administered desires to swear with uplifted hand in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question."

The formula of the Scottish oath is as follows: "I swear by Almighty God [and as I shall answer to God at the Great Day of Judgment] that I will tell the truth, the whole truth, and nothing but the truth." During the debate in the House of Commons in 1888 it was stated that the words inclosed within brackets are often left out of the oath in Scotland; but the then Lord Advocate (Mr. Macdonald) emphatically denied the fact, and warmly declared that it was "utterly contrary to law to leave that reference out." Notwithstanding this high authority, there can

be little doubt that as a matter of practice these words are now frequently omitted by the judges of the Scottish Courts in administering the oath. But, however that may be, section 5 seems to have made them part of the form when used in England, and in many quarters they constitute a strong objection to the Scottish oath. For instance, Judge Snagge the other day said that he should not like to hear the witnesses in his Court at Northampton using that form of imprecation. Hence it is all the more necessary, pending a settlement by legislation, to insist upon the view that "kissing the book," is not an essential part even of the ceremony of taking the oath according to the English form.—*Law Journal*.

THE LORD CHANCELLOR ON THE CODIFICATION OF COMMERCIAL LAW.

The Lord Chancellor, in the course of a speech, May 5, at the annual meeting of the City and Guilds of London Institute, said that the codification of the law was a subject with which he was tolerably familiar. The first observation he would make about it was that codification did not depend upon the lawyers; it depended upon the legislative machine, and their legislative machine was at present not one that did its work with great facility and great speed. There was some difficulty in getting any law passed, and if they began to codify the law, even in its commercial aspects, he was afraid that the process would last some time. What had been done already had been done with great diligence certainly and with good effect. The law of bills of exchange, for instance, scattered as it was, had been now reduced to a code, and there was a Bills of Exchange Act which contained within its four corners the law applicable to the subject. Other branches, for instance partnership law, have also been codified. They had also a law which he thought he might claim some credit for—the law of interpretation, which interpreted certain words and gave legal effect to them. This was perhaps only a modest programme, but it was only by doing things in a modest way and in small bits that it could be done at all. He entertained some doubt about the complete success of the German code if it comprehended the whole commercial law of Germany, but he had not yet seen it, and could not pronounce

a judgment upon it. The Code Napoléon itself, ever since it was passed, had given rise to a large number of treatises, and when he looked at the decisions of the Courts of France he was not certain that the code, although it was an admirable work, completely facilitated everybody in understanding the law as people seemed to suppose would be the natural result of codification. Human language required exposition, because no language was so perfect as to give every shade of meaning; and when they put a thing into the iron framework of definition, they had immediately the foundation of various controversies as to what the exact meaning of each word was. The virtue, and, he believed, the great value, of the English law had been that, instead of putting everything in an iron framework of definition, they had had the principle established of what was called the common law, and among lawyers there was not much difficulty in saying what was the common law. But there was a great difficulty in saying sometimes what was the meaning of the statute law, and that was partly due, no doubt, to the mode in which the statute was manufactured. Something was brought in, and somebody suggested an amendment, and in order to save the bill from wreck the amendment was accepted without reference to the framework of the statute, with the result that when it had to be construed by the judges it was not always absolutely satisfactory. In addition to the law as to bills of exchange they had also codified the law as to arbitration, and they were now actually employed in the codification of the law as to the insurance of shipping, which was an important part of the commercial law, and they hoped to proceed with it as fast as they could. But, as he had said, it was only by proceeding in a small way, and with an unpretentious project, that anything real could be done. It was desirable that the law should be simple, and that commercial men should be able to understand it and apply it to their business transactions, and, so far as he was concerned as the holder of his present office, he would do all he could to aid that good work.

GENERAL NOTES.

THE BAR OF CHICAGO.—A late number of the *Chicago Legal News* gives biographical sketches, accompanied by portraits, of eleven "coloured" members of the Chicago Bar, one of them a woman.

THE LEGAL NEWS.

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CURRENT TOPICS AND CASES.

When, on the 22nd of June, a vote of \$1000 was asked in the House of Commons, Ottawa, to pay the expenses of Chief Justice Strong's visit to England, for the purpose of taking his seat as a member of the Judicial Committee of the Privy Council, Mr. Davies was asked whether the Chief Justice would be able to sit on appeals from the Supreme Court of Canada. He replied that he knew nothing in the practice of the Privy Council to prevent it, but he did not give a positive opinion. "The Chief Justice's duties in London," he added, "would not interfere with his work in the Supreme Court, because the Privy Council sat in July, when Canadian Courts took long vacation." Even if there be nothing in the practice of the Privy Council to prevent it, we can hardly think that Sir Samuel Strong would adopt a course so directly at variance with the law and usage of the country he represents. The appeal from the Supreme Court is only accorded as an act of grace, and it would certainly be robbed of more than half of its prestige if the Chief Justice were to take part in the re-hearing of a case in which he had already expressed an opinion. As regards

the Province of Quebec, the learned Chief Justice seems to be to some extent in a dilemma. By all usage and tradition he cannot sit in appeal upon his own judgment, or the judgment of his Court, where special leave to appeal is accorded. On the other hand, where the amount involved is large enough, a direct appeal from the Court of Appeal or Review lies to the Judicial Committee. But should he sit even in these cases? If the party has chosen to incur the greater expense of an appeal to England, it may be suspected that it is because he has more confidence in the Judicial Committee than in the Supreme Court. Having incurred this additional expense, in the exercise of his undoubted right, will he be satisfied to have his case heard by the Chief Justice of the Court which he made option to pass by? At the date of writing, the cable has informed us that the Chief Justice has in fact sat in one Quebec appeal of the class indicated, that is to say, a direct appeal from the Quebec court.

McGill University is to have a Dean of the Law Faculty, as well as the Principal of the University itself, from Scotland. It might seem at first sight that after an existence of half a century, some graduate of the Faculty could be found qualified for this position. It might also be supposed that the system of law in force in this Province is sufficiently peculiar to make it desirable that a Canadian lawyer should fill the position. Scotchmen, however, have remarkable adaptability. They have filled with great credit seats on the Judicial Committee of the Privy Council, and Mr. Walton, the new dean, will find many of Scotch descent on the bench and amongst the bar of Canada.

The death of Mr. Joseph Amable Berthelot removes the oldest pensioned judge of the Superior Court in this Province. Mr. Berthelot was born in 1815, and admitted

to the bar in 1836, when he entered into partnership with Sir L. H. Lafontaine. On the elevation of the latter to the bench, the deceased became a partner of Sir George Etienne Cartier. During the years 1855 and 1856 he acted as judge of the Seigniorial Court then sitting in Montreal; in February, 1859, he was made a Q.C., and the following year a justice of the Superior Court; to replace Mr. C. D. Day. In 1858 he was elected *bâtonnier* of the Bar of Montreal, and re-elected by acclamation the following year. In 1860 he was appointed a judge of the Superior Court, a position which he retained until 1st September, 1876, when he retired.

Mr. Brown Chamberlin, C.M.G., who died a few days ago, was a member of the Quebec bar, but devoted himself first to journalism, and subsequently, in 1870, accepted the office of Queen's Printer. In 1891 he retired. Mr. Chamberlin married a daughter of Mrs. Moodie, well known as a writer. Many of Mrs. Moodie's sketches appeared in the *Literary Garland*, published by Mr. Lovell nearly half a century ago.

NEW PUBLICATION.

"*Le Droit Civil Canadien*," by Mr. P. B. Mignault, Q.C. Vol. III.
C. Théoret, Montreal, publisher.

The appearance of a third volume of this important work, within little more than two years from its commencement, indicates that the author is pursuing the plan laid out with unabated ardour, and that if no unexpected obstacle interferes the work will be brought in due course to its conclusion. Of the two volumes which previously appeared, the first brought the reader to the title of "Separation from Bed and Board," and the second, continuing the commentary from this point, ended with the title of "Usufruct," 498 articles being thus commented on. The present volume takes up the titles of Real Servitudes, Emphyteusis, and the first title of the third book, treating of Successions.

The plan of the work has already been noticed in referring to the first two volumes. Mr. Mignault has adopted as the basis of his work the "Repetitions" of Mourlon. The text of this work is reproduced when it is the same as that of our code, but it is not followed where the text of our law differs from the modern French law. The points of dissimilarity are carefully noted, and the differences are sufficiently considerable to represent about a third of each volume.

The title of Real Servitudes comprises nearly two hundred pages. On this subject the author has produced a considerable amount of original work. We may refer to his discussion of the subject of watercourses, pages 19 and following; on mitoyenneté, pages 58 and following; the distance to be observed in the planting of trees and hedges, page 100; the ownership of fruits on branches which hang over the adjoining property, page 111; servitudes by destination of the *père de famille*, page 151.

The title of Emphyteusis is entirely original, this title not being found in the Code Napoléon. The work commences with a historical treatise on the subject and an examination of the consequences of the rule that emphyteusis carries with it alienation.

The title of Successions occupies about 400 pages. The reader will find in examining this portion of the work a number of subjects on which the author has bestowed considerable research. Among many topics which might be indicated are those of successions devolving to ascendants and collaterals, discharge of the beneficiary heir, persons who are bound to make returns, effects of partition, etc.

It may also be remarked that a number of supplementary notes have been added which are not without considerable interest. Space does not admit of an extended notice of these points, but it is sufficient to say that the present volume fully maintains the high standard which the author reached in the previous volumes, and which have already made a reputation for the work.

SUPREME COURT OF MICHIGAN.

29 March, 1897.

CITY OF GRAND RAPIDS V. WILLIAMS.

Disorderly conduct—Peeking into windows of residence disorderly conduct—Evidence—Complaint.

One found guilty of peeking into the windows of an occupied residence, not occupied by himself, was properly convicted of being a disorderly person within the meaning of a city ordinance providing that, "All persons who shall be engaged in any illegal or immoral diversion, or shall use any insulting, indecent or immoral language, or shall be guilty of any indecent, insulting or immoral conduct or behavior in any public street, or elsewhere in said city, shall be deemed a disorderly person and shall be punished," etc.

The complaint sufficiently alleged an improper or unlawful purpose and sufficiently described the place of the alleged offence.

Testimony as to what occurred between the respondent and the parties who were watching him, was competent for the purpose of identifying him.

Error to the Superior Court of Grand Rapids; E. A. Burlingame, Judge.

Appeal of George Williams from a conviction of disorderly conduct, affirmed.

MOORE, J.—The respondent was convicted of a violation of section 1, of an ordinance of the city of Grand Rapids, entitled "An ordinance relative to disorderly persons, which reads, "All persons who shall be engaged in any illegal or improper diversion, or shall use any insulting, indecent or immoral language, or shall be guilty of any indecent, insulting or immoral conduct or behavior in any public street or elsewhere in said city, shall be deemed a disorderly person and shall be punished," etc.

The complaint, omitting the parts purely formal, reads as follows:—

"On the 8th day of September, A.D. 1895, at the city of Grand Rapids, in the county aforesaid, and within the corporate limits of said city, one George Williams was then and there guilty of indecent, insulting and immoral conduct and behavior by peeking in the window of a house on the corner of Wenham avenue and Lagrave street, said house being then and there occupied by persons living there, and not being the residence of said Williams, and was then and there found in a state of intoxi-

cation, to the evil example of all others in like case offending; contrary to the provisions of section 1 of an ordinance of said city, entitled 'An ordinance relative to disorderly persons.'"

Objection was made to the admission of any testimony because the complaint does not state an offence. First, because looking into a house where persons reside is not immoral, insulting, or indecent. Second, because no improper or unlawful purpose is alleged. Third, because the complaint does not set forth any circumstances from which it would appear that the alleged act was immoral, insulting, or indecent. Fourth, because it does not allege any person was in the house and because the complaint does not describe the place of the alleged offence.

The testimony disclosed that in the night, between half past ten and twelve o'clock, respondent was seen to leave the sidewalk and go to the bay window of a residence, about six feet from the walk and when within six inches of the window, he leaned over, with his arm on the window-sill, and putting his right hand above his eyes, looked into the window, and remained in that position about two minutes. The room was lighted; the window shade was six to twelve inches above the window sill. The room was occupied by several persons, some of whom were women, and all were dressed decorously.

The respondent did not live at the residence where this occurred, and, so far as the record discloses, he had no business to call him there. Two witnesses who saw the respondent while at the window, were allowed, over the objection of the defendant, to testify that half or three-quarters of an hour later they attempted to take hold of the accused and detain him, when he jerked away from them and jumped over a high board fence and escaped.

After the testimony was closed, the respondent asked the judge to direct a verdict in his favor. This request was refused, and after calling the attention of the jury to the provisions of the ordinance, and the contents of the complaint, he charged them: "It is no offence for a person walking along on the sidewalk and without trespassing upon the premises of another, to look through an uncurtained window or a window partially covered with a curtain. But if a person steps off a sidewalk, not at the usual approaches or walks to a house, and for no legitimate purpose and without the consent and against the will of the owner,

in such case he may be a trespasser, and wrong-doer; and if after so trespassing he proceeds to a window with a curtain, raised from five to twelve inches, and leans upon the window sill, and with no legitimate purpose in so doing, such peeking in at such window so shaded by curtains, at eleven or twelve o'clock at night, may in the law be said to be peeking into the window, although he is not looking through a small crack, and in this case I will leave it to you to say whether the respondent was peeking into the window or not."

Other features of the case were discussed and the jury returned a verdict of guilty. The second objection to the complaint is decided against the position of the respondent, by the case of *Grand Rapids v. Bateman*, 93 Mich. 135.

The objection that the complaint does not sufficiently designate the place of alleged offence, is not well taken: *Green v. State*, 4 So. 548.

The question involved is, did the complaint state an offence punishable by the ordinance? We cannot conceive of any conduct much more indecent and insulting than for a stranger to be peeking into the windows of an occupied lighted residence, and especially at the hours of night when people usually retire.

The judge was not in error in holding that the complaint stated an offence. The testimony admitted as to what occurred between the respondent and the parties who were watching him, was entirely competent for the purpose of identifying him. The verdict of the jury was justified by the evidence. Judgment is affirmed. The other justices concurred.

COURT OF APPEAL.

LONDON, 15 June, 1897.

STONE V. THE PRESS ASSOCIATION. (32 L.J.)

Consolidation of actions—Libel.

Appeal from an order of Bruce, J., at chambers.

The action was brought to recover damages for a libel published by the defendants. The plaintiff had commenced sixteen other actions in respect of substantially the same libel against sixteen newspapers, to whom the alleged defamatory paragraphs

had been supplied by the defendants. The defendants in this and the other actions, before delivery of the defences in the actions, applied under section 5 of the Law of Libel Amendment Act, 1888, to have the several actions consolidated. The plaintiff contended that the actions could only be consolidated for the purpose of trial, and that there was no jurisdiction to make the order before delivery of the defences in the actions.

Bruce, J., made an order directing that the actions should be consolidated at once.

The plaintiff appealed.

Their Lordships (Lord Esher, M.R., Smith, L.J., Rigby, L.J.), held that the Court has jurisdiction under section 5 of the Law of Libel Amendment Act, 1888, where several actions are brought by the same plaintiff against different defendants for the same, or substantially the same, libel, to order the actions to be consolidated before delivery of defences in the actions, and they affirmed the order of Bruce, J.

Appeal dismissed.

COURT OF APPEAL.

LONDON, 24 June, 1897.

PLANT V. BOURNE (32 L.J.)

Vendor and purchaser—Specific performance—Contract—Statute of frauds—Parcels—Uncertainty—Extrinsic evidence.

Appeal from a decision of Byrne, J., reported 66 Law J. Rep. Chanc. 458.

The plaintiff and defendant signed a written agreement as follows: "The said Robert Plant agrees to sell, and the said Robert Henry Bourne agrees to purchase at the price of 5,000*l* twenty-four acres of land freehold, and all appurtenances thereto, at Totmonslow, in the parish of Dracott, in the county of Stafford, and all the mines and minerals thereto appertaining, possession to be had on the 25th of March next, the vendor guaranteeing possession accordingly." The defendant refused to complete, and the plaintiff brought this action. At the trial he proposed to call evidence to prove that the twenty-four acres mentioned in the agreement were twenty-four acres belonging to himself,

surrounded by a ring fence, and well known to the defendant who had examined the land just before signing the agreement.

Byrne, J., held that there was not in the agreement a sufficient description of the land to satisfy the Statute of Frauds, and that parol evidence to identify it was inadmissible.

The plaintiff appealed.

Their Lordships (Lindley, L.J., Lopes, L.J., Chitty, L.J.), allowed the appeal. They said that it was settled by *Ogilvie v. Foljambe*, 3 Mer. 53, and *Shardlow v. Cotterill*, 50 Law J. Rep. Chanc. 613; L.R. 20 Chanc. Div. 90, that when there was an uncertain description of the property sold, parol evidence was admissible to show to what premises the agreement related. Here it was said that there was no description of any property at all, and that the evidence, if admitted, must prove a different contract. But the vendor was selling his own land, and although the word "my" was not inserted before "twenty-four acres," the description was sufficient to make evidence for purposes of identification admissible.

THE COMMON SENSE OF COMMON LAW.

"The question," says Sir Frederick Pollock, "our law loves to come round to under every disguise and variation of circumstances is not what a man said in terms, but what his words or conduct or both together gave the other party reasonable ground to expect." Here the genius of practical common sense, which is the glory of our common law, reveals itself, and it is well illustrated in the recent case of *Bloomenthal v. Ford*. A company wants to borrow 1,000*l.*, and it gets a printer and stationer to advance the money on the terms that the company is to deposit with him as security certificates for 10,000 fully paid-up preference shares of the company, which the company does, and registers the lender as the holder. Then it borrows another 600*l.* of him on the same terms, and then it meets the fate of most borrowers and goes into liquidation. Now, had the shares been fully paid the stationer would have suffered the loss of a great part of his loan, that would have been the extent of his calamity; but the security had this fatal flaw, that the shares were not really paid up at all in cash or kind, and the holder was consequently in due course invited by the liquidator to contribute

some 16,000*l.* to the assets—a demand which the Court of Appeal actually upheld. The lender—this was the view which the Lords Justices took—might have known, and ought to have known, that the shares were not fully paid; they did not give sufficient weight to the fine old doctrine of estoppel, beloved, as Sir F. Pollock says, of our law. The House of Lords has happily saved this scandal to the administration of justice, and has put the law, or rather declared the law to rest, on a broader and sounder basis. When a company or anybody else makes a representation which it intends the person to whom it is made to act upon, and he does act upon it, neither good conscience nor law will allow the maker of the representation to say, “You might have found out that what I told you was false.” The answer is, given long ago by Lord Chelmsford, “Your misrepresentation put me off my guard.”—*Law Journal (London)*.

THE LAW OF EVIDENCE (CRIMINAL CASES) BILL.

Sir Harry Poland, in a letter to the *London Times*, with respect to the bill before the Imperial Parliament bearing the above title, says :—

I shall be glad if you will allow me to make a few comments upon some of the principal points which will have to be dealt with when the committee stage is reached, which will be shortly after Parliament meets.

The first is—Ought husbands and wives to be made compellable witnesses against each other? Sir Herbert Stephen in his letter which appeared in the *Times* of April 24 says that “to make them compellable seems to be inhuman.” He further says that “the wife of a man guilty of crime is bound by law, by religion, and by her solemn vow to assist, succour, and cherish her husband,” and that “the bill proposes to give her choice between (1) breaking this solemn obligation, (2) committing perjury, and (3) going to prison for contempt of Court.” Anyone reading the last paragraph of his letter would suppose that a wife is to be compelled for the first time to give evidence against her husband, whereas both by the common law and by the statute law she is in certain cases not only a competent witness but a compellable witness.

This is the common law: “In any criminal proceeding against a husband or wife for any bodily injury or violence inflicted upon

his or her wife or husband, such wife or husband is competent and compellable to testify"; and the same rule of law applies to cases of treason. The following is an instance of the statute law: The Married Woman's Property Act, 1888 (47 & 48 Vict., c. 14), enacts that "in any such criminal proceeding against a husband or a wife as is authorized by the Married Woman's Property Act, 1882, the husband and wife respectively shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence." The Government bill therefore extends the law as it applies to these cases to all cases; and is there any good reason why a wife should be compelled to give evidence against her husband when he is charged with giving her a black eye, or with fracturing one of her ribs, and not be compelled to give evidence against him when he has murdered or injured one of their children or her child by a former marriage? And there is this absurdity, that if a husband administered poison to his wife and child, and the wife recovered and the child died, she could be compelled to give evidence against him for the attempt to poison herself, but could not on the charge of murdering the child. It may be said that it is sufficient if she is made a competent witness; but that is not so, for all persons acquainted with criminal courts must have known many cases where a wife has been willing to give evidence against her husband in cases where she is a compellable witness, and the husband, or his friends, have threatened and intimidated her and prevented her from coming to the Court to give evidence, and there are other cases in which the wife has been persuaded by her husband's friends, and by her own friends, not to give evidence, when, in the interests of justice and for her own protection and for the protection of her children, she ought to have been made to attend the Court to be sworn as a witness, and then to be free to give her evidence against her husband. The Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict., c. 41), although it did not go so far as to make a wife compellable to give evidence, yet it does provide for her being required to attend at the Court. The words of that Act are "such person shall be competent, but not compellable, to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case, and shall be competent, but not compellable, to give

evidence." There are other statutes to the same effect. Sometimes when the husband is charged with offences against his or his wife's child, her evidence is only required to prove the age of the child. I have known a case in which the wife gave evidence against her husband before the magistrates, when he was charged with an indecent assault on her child, by proving that such child was under thirteen years of age, but when the trial took place at the sessions she declined, as she was entitled to do, to give evidence there, and so the age of the child could not be proved. In some of the serious cases under the Criminal Law Amendment Act the age of the child has to be proved, and it must be remembered that where the registration of the birth of the child has taken place in Scotland or Ireland, or a long distance from the place of trial, the wife of the accused is often the only person who can prove the age of the child without a great deal of trouble and expense.

The proposed change in the law may or may not be considered desirable, but denouncing it as "inhuman" and "revolutionary" does not assist the argument, nor do sentimental appeals to religion and to the woman's marriage vow seem to be of much use. I am not aware that in any marriage service the woman makes a vow to "assist and succour" her husband if he commits a crime, and she makes no vow at all if she is married before a registrar. The relations of the accused, when required to give evidence against him, under the present law are always treated with great consideration and kindness, and are never unduly pressed.

The second point is—Should a prisoner be cross-examined to his "credit," and also as to his former convictions? This is a point of great difficulty, in which there is also a good deal to be said on both sides. Let me put this case by way of example. A respectable girl has charged a man with a gross act of indecency. On the prisoner's instructions she is cross-examined to her "credit," and a number of suggestions are made against her. The prisoner elects to give evidence, and he says that the girl has perjured herself, and that the charge made against him is false. Is he to go out of the witness-box without being cross-examined to his "credit" when a year before he was convicted of an indecent assault of a similar character on another girl, and when it is known that he was kicked out of his lodgings for acts

of indecency? Again, there are some cases of a terrible kind in which a prosecutor is cross-examined and in which, if the suggestions made against him are true, he is not fit for the society of decent people. Is the prisoner to be allowed to go into the witness-box and to deny everything the prosecutor has said and to walk out of the box as if he were a respectable and decent member of society who had the misfortune to be improperly accused of the offence? Care must, of course, be taken that a man who has been convicted of crime is not convicted by reason of his bad character, but it is not a good reason against the proposed change in the law to urge that men who have been convicted of crimes and who elect to give evidence are not placed by this bill in the same position as men of good character who elect to give evidence. We need not shed many tears over the habitual criminal, although we must take care that he gets justice. It must not be forgotten that in the twenty-five or twenty-six Acts under which the defendant is already made a competent witness there is no provision to prevent his being cross-examined like an ordinary witness. Here is a specimen of one of them. Sir William Harcourt's Explosive Substances Act, 1883 (46 & 47 Vict., c. 3), s. 4, enacts that "in any proceeding against any person for a crime under this section such person and his wife, or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case." The Lord Chief Justice of England is of opinion that if a prisoner elects to go into the witness-box he ought to be liable to be cross-examined to his credit like any other witness, and although I entertained a different opinion for some time I have quite come round to his view. If a prisoner has been convicted over and over again he had better not go into the witness-box. The case for the prosecution will then have to be proved against him as at present, and the judge trying the case must be trusted to make the jury understand this.

The third point is—If a prisoner does not elect to go into the witness-box, should any comment be allowed to be made upon that fact? Juries will soon know that prisoners can go into the witness-box in all cases, and will take notice of the fact when they do not do so. Smith is tried in the morning, and his counsel with a flourish of trumpets refers to the salutary change

in the law by which he can call his client, his wife, and the wife of Smith's co defendant Robinson. In the afternoon Brown is charged before the same jury, and Brown's friends go into the witness-box to prove an *alibi* for him, and Brown's wife also goes into the witness-box, but he does not himself go there. The jury will not fail to notice this, even if it is not to be alluded to in any way by the counsel or the judge. There are cases in which it would be proper to comment on the prisoner's absence from the witness-box, and cases in which it would be improper to do so.

In some of the colonial Acts there is a provision to prevent such comment from being made, and, although the judges loyally endeavour to carry out the directions of the Legislature, such provision is of little use, as the juries know full well that the prisoner might have gone into the witness-box and for some reason did not adopt that course.

The fourth point is—Is it right that persons should be put under the temptation to commit perjury, and is it not desirable that the future prisoner and his wife should not give evidence on oath? This is a very small matter. As long as the accused is a competent witness, and the husband or wife is not only a competent but compellable witness, it is of little consequence whether the evidence is given on oath or on affirmation or declaration without an oath. There are many persons who will agree with my friend Mr. H. C. Richards, who, I understand, proposes that the evidence given by the accused person under this bill shall not be on oath, and who think that what Pericles said to Helicanus in the play is true—

I'll take thy word for faith, not ask thine oath;
Who shuns not to break one will sure crack both.

The fifth point is—It is proposed that counsel should be assigned in every case to an undefended prisoner.

This is, in my humble judgment, a most mischievous proposal. I should rejoice if in all cases a solicitor could be assigned to a prisoner to get up his case and to instruct counsel, but with regard to assigning counsel to a prisoner, I have seen injustice done by the practice being adopted in capital cases. Counsel assigned by the judge cannot in many cases get fully instructed as to the prisoner's defence, subpoena his witnesses, and do solicitor's work. He makes the best defence he can from the

depositions, and it may be that it is not exactly the defence which the prisoner would himself make when a witness in the witness-box.

One of the most valuable provisions of this bill is that it will give protection to the innocent prisoner who is not defended by counsel, for he will be able to go into the witness-box and tell his story, and the judge will take care that his real defence is made, and if, by reason of his ignorance or poverty, he has not brought witnesses whom he says can support his statement the judge can adjourn the trial and have them sent for by the officer of the Court, or if the case is prosecuted by the Director of Public Prosecutions the judge can request him to procure their attendance. The judge can also, when he finds out what the prisoner's story is, recall the witnesses for the prosecution, if necessary, and ask them questions which the prisoner ought to have asked himself. To call the questions put by the prosecuting counsel or the judge, to get at the real facts of the case, a "cross-examination" is hardly accurate.

The last point is—Should prisoners only be allowed to give evidence when being tried on an indictment at assizes or sessions, and not by a Court of summary jurisdiction? Such a restriction is impossible. It is as important that an innocent man should be competent to give evidence in one case as in the other. If an illustration were wanted of this, I would refer to a letter which appeared in the *Times* of May 18 last from Mr. Evelyn S. Hopkinson, an undergraduate of Exeter College, Oxford, and I would ask any candid person to say, after reading that letter, whether the law which excludes a defendant in such a case can be a just law. If Mr. Hopkinson had been a competent witness he would have gone into the witness-box, his evidence would have been taken down like the evidence for the prosecution, and in any event the proceedings would have been less summary than he says they were. To call witnesses for the defence and not to allow the defendant himself to give evidence is, as you point out in your able article from which I have already quoted, as little to be justified as the exclusion from the witness-box of the parties to suits in civil actions.

All the great lawyers with whom I have from time to time for years past talked over the question as to accused persons being allowed to give evidence have advocated the change in the

law on the sole ground that it would protect innocent persons, and that distinguished judge, Chief Justice Way, has informed me that the Act enabling accused persons to give evidence works well in South Australia.

It is certainly time that we made up our minds as to what is the proper way of trying an accused person, and the opportunity has at last arrived for the wisdom of Parliament to determine whether we shall revert in all cases to the old system of trial, whether we shall allow the existing "atrocious anomalies" (Lord Salisbury's expression, I think) to continue in the present modes of trial, or whether the proposed new system provided by this bill shall prevail in all cases. It is fortunate that the leading men on both sides of the House have supported the principle of this bill, as it will consequently be dealt with in committee simply as a bill for the reform of the law, in which party politics can have no part.

As the second reading of this bill was carried by so large a majority, and as it has your powerful aid and that of the Press generally, it will in all probability be passed this session, and it therefore behoves everyone, lawyer or layman, who has had experience in criminal trials to assist in making it as perfect a bill as possible. No good can come of charging your opponents with being "pathetically ignorant of their own ignorance," or of prophesying that thirty innocent persons on one circuit alone will be convicted if this bill is allowed to become law.

GENERAL NOTES.

DIVORCE.—A judge of Janesville, Wisconsin, granted a decree of divorce to a woman whose husband puffed tobacco smoke through the keyhole of a door leading into a room where her mother lay sick.

LITIGATION IN INDIA.—The Government of India has addressed a letter to the Government of Bengal on the increase of litigation. Reference is made to the "enormous and apparently increasing" number of appeals in civil suits. The figures show that there are appeals in about 30 per cent. of the contested cases in India, and that there are 240 appeals in India for every one in England from inferior Courts.

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No. 15.

SUPREME COURT OF CANADA.

OTTAWA, 1 May, 1897.

Exchequer Chamber.]

THE QUEEN v. CANADA SUGAR REFINING CO.

*Revenue Customs duties—Importation of goods—Time of importation
—Tariff Act—Construction—Retrospective legislation—R. S. C.
c. 32—57 & 58 Vict., ch. 33 (D)—58 & 59 Vict., ch. 23 (D).*

By sec. 4 of the Customs Tariff Act, 1834 (57 & 58 Vict., ch. 33), duties shall be levied on certain specified goods "when such goods are imported into Canada." By R.S.C. ch. 32, sec. 150 (the Customs Act), the importation of goods "shall be deemed to have been completed from the time the vessel in which such goods were imported came within the limits of the port at which they ought to be reported," and by sec. 25 the master of a vessel entering any port of Canada must report in writing to the collector or proper officer the particulars of his ship and cargo and the portion to be landed at that port etc. Sec. 31 provides that duties shall not be collected at a port where goods are entered but not landed.

Held, that the importation under sec. 150 is not completed at the first port of entry of the vessel if the goods are not landed there, but only at her arrival at her port of final destination. Therefore when a vessel containing sugar entered North Sydney in April, 1895, and reported under sec. 25 and then proceeded to Montreal, where she arrived on May 4th, and landed her

cargo, the sugar was liable to duty under an act which came into force on May 3rd.

Held further, that the duties attached notwithstanding said act did not receive the royal assent until July, 1895, it containing a provision that it should be held to have come into force on May 3rd.

Appeal allowed with costs.

Fitzpatrick, Q.C., Solicitor General of Canada, and *Newcombe, Q.C.*, Deputy Minister of Justice, for the appellant.

Osler, Q.C., and *Gormully, Q.C.*, for the respondent.

1st May, 1897.

Ontario.]

ROGERS v. TORONTO PUBLIC SCHOOL BOARD.

Negligence—Unsafe premises—Risk voluntarily incurred.

An employee of a company which had contracted to deliver coal to the defendant went voluntarily to inspect the place where the coal was to be put on the evening preceding the day upon which arrangements had been made for the delivery, and was accidentally injured by falling into a furnace pit in the basement on his way to the coal bins. He did not apply to the defendant or the caretaker in charge of the premises before making his visit.

Held, that in thus voluntarily visiting the premises for his own purposes and without notice to the occupants, he assumed all risks of danger from the condition of the premises and could not recover damages.

Appeal dismissed with costs.

McCarthy, Q.C., for the appellant.

Robinson, Q.C., and *Hodgins*, for the respondents.

1st May, 1897.

Ontario.]

JAMESON v. THE LONDON AND CANADIAN LOAN AND AGENCY COMPANY.

Mortgage—Leasehold premises—Terms of mortgage—Assignment or sub-lease.

A lease of real estate for twenty-one years with a covenant for a like term or terms was mortgaged by the lessee. The mort-

gage after reciting the terms of the lease proceeded to convey to the mortgagee the indenture and the benefit of all covenants and agreements therein, the leased property by description and "all and singular the engines and boilers which now are or shall at any time hereinafter be brought and placed upon or affixed to the said premises, all of which said engines and boilers are hereby declared to be and form part of the said leasehold premises hereby granted and mortgaged or intended so to be and form part of the term hereby granted and mortgaged"; the *habendum* of the mortgage was "To have and to hold unto the said mortgagee, their successors and assigns for the residue yet to come and unexpired for the term of years created by the said lease, less one day thereof, and all renewal etc."

Held, reversing the judgment of the Court of Appeal, that the premises of the said mortgage above referred to contained an express assignment of the whole term, and the *habendum*, if intended to reserve a portion to the mortgagor was repugnant to the said premises and therefore void; that the words "leasehold premises" were quite sufficient to carry the whole term, the word "premises" not meaning lands or property, but referring to the recital describing the lease as one for a term of twenty-one years.

Held further, that the *habendum* does not reserve a reversion to the mortgagor; that the reversion of a day generally, without stating it to be the last day of the term, is insufficient to give the instrument the character of a sub-lease.

Appeal allowed with costs.

Armour, Q.C., and *Irving*, for appellant.

Arnoldi, Q.C., for respondents.

1st May, 1897.

Ontario.]

CONSUMERS' GAS CO. v. TORONTO.

*Assessment and taxation—Exemptions—Real property—Chattels—
Fixtures—Gas pipes—Highways—Title to portion of highway
—Legislative grant of soil in highway—11 Vict., ch. 14 (Can.)
—55 Vict., ch. 48 (Ont.)—Ontario Assessment Act, 1892.*

Gas pipes laid under the streets of a city which are the property of a private corporation are real estate within the meaning of the "Ontario Assessment Act of 1892" and liable to assess-

ment as such, as they do not fall within the exemptions mentioned in the sixth section of the act.

The appellant was incorporated by an act of the late Parliament of Canada passed in the eleventh year of Her Majesty's reign, chapter 14, by the first clause of which power was conferred "to purchase, take and hold lands, tenements and other real property for the purposes of the said company, and for the erection and construction and convenient use of the gas works of the company, and further, power was conferred by the thirteenth clause, "to break, dig, and trench so much and so many of the streets, squares and public places of the said City of Toronto as may at any time be necessary for the laying down the mains and pipes to conduct the gas from the works of the said company to the consumers thereof, or for taking up, renewing, altering or repairing the same when the said company shall deem it expedient.

Held, that these enactments operated as a legislative grant to the company of so much of the land of the said streets, squares and public places of the city and below the surface that it might be found necessary to be taken and held for the purposes of the company and for the convenient use of the gasworks, and when the openings are made at the places designated by the city surveyor, as provided in said charter and they are placed there, the soil they occupy is land taken and held by the company under the provisions of the said act of incorporation.

That the proper method of assessment of the pipes so laid and fixed in the soil of the streets and public places in a city ought to be as in the case of real estate and land generally, and separately in the respective wards of the city in which they may be actually laid.

Appeal dismissed with costs.

McCarthy, Q.C., and *Miller, Q.C.*, for the appellant.

Robinson, Q.C., and *Fullerton, Q.C.*, for the respondent.

1st May, 1897.

Ontario.]

MAY v. LOGIE.

Will—Sheriff's deed—Evidence—Proof of heirship—Rejection of evidence—New trial—Puppet—Champerty—Maintenance.

A will purporting to convey all the testator's estate to his wife was attacked for uncertainty by persons claiming under alleged

heirs at law of the testator, and through conveyances from them to persons abroad. The courts below held that the will was valid.

Held, affirming such decisions, that as the evidence of the relationship of the alleged grantors to the deceased was only hearsay, and the best evidence had not been adduced; that as the heirship at law was dependent upon the alleged heir having survived his father and it was not established and the court would not presume that his father died before him; and that as the persons claiming under the will had no information as to the identity of the parties in interest who were represented in the transactions by men of straw, one of whom was alleged to be a trustee, and there was no evidence as to the nature of his trust and that as there was strong suspicion of the existence of champerty or maintenance on the part of the persons attacking the will, the latter had failed to establish the title of the persons under whom they claimed and the appeal should be dismissed.

Appeal dismissed with costs.

Donovan, for the appellant.

Shepley, Q.C., for the respondent.

1 May, 1897.

Nova Scotia.]

MANUFACTURERS ACCIDENT INSURANCE CO. v. PUDSEY.

*Accident insurance—Renewal of policy—Payment of premium—
Promissory note—Instructions to agent—Agent's authority—
Finding of jury.*

A policy issued by the Manufacturers Accident Insurance Company in favour of P., contained a provision that it might be renewed from year to year on payment of the annual premium. One condition of the policy was that it was not to take effect until the premium was paid prior to any accident on account of which a claim should be made, and another that a renewal receipt, to be valid, must be printed in office form, signed by the managing director and countersigned by the agent.

P. having been killed in a railway accident payment on the policy was refused on the ground that it had expired and not been renewed. In an action by the widow for the insurance it was shown that the local agent of the company had requested P.

to renew and had received from him a promissory note for \$15 (the premium being \$16), which the father of the assured swore the agent agreed to take for the balance of the premium after being paid the remainder in cash. He also swore that the agent gave P. a paper purporting to be a receipt and gave secondary evidence of its contents. The agent's evidence was that while the note was taken for a portion of the premium it was agreed between him and P. that there was to be no insurance until it was paid, and that he gave no renewal receipt, and was paid no cash. Some four years before this the said agent and all agents of the company had received instructions from the head office not to take notes for premiums as had been the practice theretofore. The note was never paid but remained in possession of the agent, the company knowing nothing of it. The jury gave no general verdict, but found in answer to questions that a sum was paid in cash and the note given and accepted as payment of the balance of the premium; and that the paper given to P. by the agent, as sworn to by P's father, was the ordinary renewal receipt of the company.

Held, affirming the judgment of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that the fair conclusion from the evidence was, that as the agent had been employed to complete the contract and had been entrusted with the renewal receipt, P. might fairly expect that he was authorized to take a premium note, having no knowledge of any limitation of his authority and the policy not forbidding it, and that notwithstanding there was no general verdict, and the specific question had not been passed upon by the jury, such inference could be drawn by the Court according to the practice in Nova Scotia.

Held, further, that there was evidence upon which reasonable men might find as the jury did. That an inference might fairly be drawn from the facts that the transaction amounted to payment of the premium, and it was to be assumed that the act was within the scope of the agent's employment. The fact that the agent was disobeying instructions did not prevent the inference though it might be considered in determining whether or not such inference should be drawn; and that a new trial should not be granted to enable the company to corroborate the testimony of the agent that he had no renewal receipt in his possession except one produced at the trial, as the company might have

supposed that the plaintiff would seek to show that such receipt had been obtained, and were not taken by surprise.

Appeal dismissed with costs.

Wallace Nesbitt, for the appellant.

W. A. B. Ritchie, Q.C., for the respondent.

COURT OF APPEAL.

LONDON, 28 June, 1897.

Before LORD ESHER, M.R., SMITH, L.J., RIGBY, L.J.

HOPE v. BRASH ET AL. (32 L.J.)

*Discovery—Inspection—Libel in newspaper—Manuscript of libel—
Admission of publication and liability.*

Appeal of the defendants from an order of Bruce, J., at chambers.

The action was brought for a libel published in a newspaper belonging to the defendants. The defendants by their defence admitted the publication of the libel, and pleaded that the libel was published by them without actual malice and without gross negligence; that before the commencement of the action they published in their newspaper a full apology for the libel, according to section 2 of the Libel Act, 1843; and they paid into court a sum of money in satisfaction of the plaintiff's claim.

The defendants in their affidavit of documents stated that they had in their possession or power the documents relating to the matters in question in the action set forth in the first and second parts of the schedule thereto. In the second part of the schedule they stated that they had in their possession a manuscript of the matters published in their newspaper, but they objected to produce it on the ground that it was the original contribution to them, and was that which was published by them as admitted in the statement of defence, and as to which they admitted responsibility.

Bruce, J., made an order for the production of the manuscript for inspection.

The defendants appealed.

J. E. Bankes, for the defendants, cited *Hennessy v. Wright*, (No. 2), L. R. 24 Q. B. Div. 445n.

Montague Lush, for the plaintiff, cited *Bustros v. White*, 45 Law J. Rep. Q.B. 642 ; L.R. 1 Q.B. Div. 423.

Their Lordships held that where in an action against the proprietors of a newspaper for a libel published in the paper the publication and responsibility for the libel are admitted, the Court as a general rule will not order the original manuscript of the libel to be produced for inspection. They were of opinion that there were no special circumstances in the present case by reason of which the Court ought to depart from the general rule, and they accordingly allowed the appeal.

LIBEL AND CRITICISM.

A scientific man has written a book in which he attempts to disprove the existence of the force of gravity. A scientific newspaper, in reviewing the book, attempted to show by way of criticism that the author does not know enough to be able to appreciate the force of the argument by which the law of gravitation is proved. The author says that this is a false and malicious libel, and that it has damaged him to the extent of thousands of dollars. Criticism in good faith of an author's work is allowed almost without restriction; but the law guards the private individual as distinguished from the man in his public capacity. It does not permit the critic to go behind the book to attack the author as a private person. On these principles Mr. Ruskin, in speaking of Mr. Whistler's paintings, was able with impunity to charge the artist with the "cockney impudence" of asking two hundred guineas for "flinging a pot of paint in the public's face." But when he accused him of "wilful imposture" he overstepped the mark, and had to pay a farthing in damages. In the present case, the question is whether the imputation of ignorance has a legitimate bearing as criticism upon the book. If the imputation of ignorance is made as an inference from the book itself, it seems to have a clear connection with the credit to which the book is entitled. It is true that in an English case, *Dunne v. Anderson*, 3 Bing. 88, it was held to be libel for one, in criticising a petition to Parliament by a physician, to reflect upon the physician's knowledge of chemistry. But that case is to be distinguished from the present one, in that in presenting the petition the physician is not so distinctly

before the public as the author in publishing a book. As Lord Cockburn says in *Strauss v. Francis*, 4 F. & F. 1114, "a man who publishes a book challenges criticism." The critic is strictly accountable for any damaging misstatement of fact; but here there is no such misstatement. If there were nothing in the book which might lead a reasonable man in the critic's position to take the same view, it might be held that this was not fair criticism. But the force of gravity is well enough established for the Courts to take judicial cognizance of it; and they are hardly likely to hold that this statement, if made merely as a deduction from the author's treatment of his subject, was so unfounded as to be a libel, rather than a fair though strong criticism.—*Harvard Law Review*.

MARINE INSURANCE—NOTICE OF ABANDONMENT.

For many years it has been considered a settled principle of the law of marine insurance that when the assured has given notice of abandonment to the underwriter he is entitled to recover for a total loss, provided that the facts of the case justified the abandonment and there was no restitution of the property insured before his action was brought. In *Ruys v. The Royal Exchange Assurance Corporation*, however, the defendants contended that if at any time before judgment the property was restored to the assured, his right of action was gone, though when the writ was issued all the elements of a constructive total loss existed. Fortunately, Mr. Justice Collins refused to disregard a rule on which the mercantile community has invariably acted. The reason for the rule is clearly explained in "Arnould on Insurance" (p. 14). The law must confine its regard to some fixed instant of time at which the facts may be ascertained for the purpose of judgment. If before the issue of a writ there be restitution of his property, the assured ceases to be in a condition requiring to be indemnified against a total loss. On the other hand, it would be a hardship on the assured if a claim fully justified by the facts existing when his writ was issued could be defeated by a subsequent change of circumstances. Unreasonable refusals on the part of underwriters to accept notices of abandonment and delay in the settlement of claims might inevitably follow.—*Law Journal (London)*.

CERTIORARI.

The case of *Regina v. The Company of Watermen and Lightermen of the River Thames*, L.R. (1897), 1 Q.B. 659, points to a defect in the law as to *ultra vires* acts of non-judicial authorities. The company, under section 55 of its private Act of 1859 (22 & 23 Vict., c. cxxxiii), has the power to grant licences to watermen, and can, for certain purposes not specifically stated to include licensing, take evidence on oath. It granted a waterman's licence in the face of an objection that the applicant was not qualified. The objector sought to upset the decision by *certiorari*. But the Court refused the writ, taking the view that, like county councils in licensing matters, the Watermen's Company exercised no judicial powers. There seems no way out of this conclusion, for in all the cases in which *certiorari* is granted in respect of administrative proceedings there appears to be express statutory warrant for the application of this remedy, though the form of some old Acts—*e.g.* the Poor Law Amendment Act, 1834 (4 & 5 Wm. IV., c. 76), s. 106, shows that lawyers of past generations were by no means so sure as modern judges of the distinction between administrative and judicial proceedings.—*Ib.*

"MENS REA."

The resort of judges to the old dicta about a guilty mind, which we criticised lately with reference to an adulteration case, has received some consideration in the Privy Council in *The Bank of New South Wales v. Piper* (May 21). The Bank had prosecuted Piper for selling and disposing of sheep and cattle, subject to a lien in favour of the bank, without the bank's written consent, contrary to the Colonial Act, 11 Vict., No. 4, s. 7. The Attorney-General of the colony had refused to file an indictment, and the bank were successfully sued for malicious prosecution, the Supreme Court of the colony holding that the offence for which the prosecution had been instituted could not be committed unless the seller acted with fraudulent intent. The Judicial Committee, on an examination of the statute, came to the opposite conclusion—*viz.* that the Legislature meant to make disposal of the mortgaged subjects without the written consent of the mortgagee a criminal offence. But the general propo-

sition of the Committee which merits our attention is as follows : "It is strongly urged that in order to the constitution of a crime whether common law or statutory, there must be a *mens rea* on the part of the accused, and he may avoid conviction by showing that such *mens rea* did not exist. This is a proposition which their lordships do not desire to dispute; but the questions whether a particular intent is made an element of a statutory crime, and, when that is not the case, whether there is an absence of *mens rea* in the accused, are questions entirely different, and depend on different considerations. In cases where a statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent. The case of *Sherras v. De Rutzen*, 64 Law J. Rep. M.C. 218; L.R. (1895) 1 Q.B. 918, is an instance of its absence." The decision of the Judicial Committee, which was with reference to an indictable offence, is certainly not calculated to strengthen the judgment in *Derbyshire v. Houlston* (noted *ante*, p. 280).—*Ib.*

INJURY TO THE NERVES.

The primitive common law cared little for nerves. It dismissed nervous sufferings contemptuously as sentimental. But one of the best qualities of the common law is its power of adjusting itself to the changing conditions of the social environment. In divorce, for instance, the conception of cruelty is no longer confined to bodily injury or reasonable apprehension thereof. It includes conduct endangering a wife's health or injurious to her feelings, and the same principle is spreading to torts. It is true if an express train whizzes by you without touching you that you can get no redress for the fright, though the shock may shatter your nervous system. There must be 'impact' (*The Victorian Railway Commissioners v. Coultas*)—so much mediæval materialism still clings to our law, but such an alarm differs, *toto cælo*, from a malicious hoax like that of telling a wife that her husband is lying disabled by an accident (*Wilkinson v. Downton*). Here are all the elements of a genuine tort or wrong, and it would be a reproach to any system of law if such a hoax were

not actionable as well as stupid and cruel. Mr. Justice Wright's decision constitutes, no doubt, a new departure; it opens a vista of possibilities fraught with problems for the judges of the future; but it is a new departure for which the age is ripe. All rational beings are now agreed that an injury to the feelings and to the nerves is as real an injury as, and often a much worse injury than, one done to the body.—*lb.*

THE MEDICAL PROFESSION AND THE LAW.

Doctors, says the *Law Journal*, are between two fires. If they disclose secrets in breach of professional confidence, the *Kitson-Playfair Case* is a warning of the Nemesis which may overtake them at the hands of a jury. Now we have another picture presented to us in a Scotch case, wherein the consequences of being loyal to professional honour were disastrous. The doctor in the case in question was insured under an accident policy covering, *inter alia*, blood-poisoning. In operating on a lady patient afflicted with syphilis, he scratched his finger and set up blood-poisoning. The injury was within the policy, the evidence clear, the doctor's *bona fides* unimpeachable; but the insuring company claimed to have the name of the lady patient. The doctor would not give it; his collegiate oath pledged him not to; and the Court in consequence dismissed his claim, on the ground that he had not furnished the evidence required, that is to say, the best evidence. It comes to this, as Lord Young, who dissented, observed, 'that however candid and credible the pursuer's statements may be, and however much they may be believed and supported by evidence . . . his claim must be rejected unless he is prepared to do what is confessedly dishonourable, that is to disclose the name of the patient from whom he received the infection.' Medical men will in future, we may safely predict, fight shy of this sort of insurance company.

GENERAL NOTES.

THE OLDEST WILL.—The oldest will extant, unearthed by Professor Petrie at Kahum, Egypt, is at least four thousand years old. In its phraseology the will is singularly modern in form, so much so that it might be admitted to probate to-day.

SALARIES OF U.S. JUDGES.—The salaries of U.S. judges are engaging the attention of Congress. Bills are pending to raise the salary of the district judges to \$6,000, and to reimburse them for their expenses when travelling and holding district or circuit courts other than their own. "It is well known," says the *Albany Law Journal*, "that our Federal judges are under-paid for the important and exacting public services they render to the people and the country. The salary of \$5,000 is entirely insufficient for the ability, learning, and labour required of them. Under the present system these judges are subject to judicial service in three different Courts—viz., the District Court, the Circuit Court, and the Circuit Court of Appeals. The circuit judges now receive \$6,000, and there is no apparent reason why the district judges should not get as much. It is a matter of surprise that so many lawyers of eminent ability are willing to give up more lucrative practice to accept positions on the Bench."

JUDGMENTS PAST AND PRESENT.—Judges have frequently been charged of late with adding to the law's delay by inordinately long judgments. The criticism is not always without some foundation; but the failing is not peculiar to the present occupants of the Bench. In the Kenyon Manuscripts is this letter, written in 1801 by Lady Kenyon to the Hon. George Kenyon: "I asked L— how the Chancellor (Lord Eldon) and Lord Alvenley (Chief Justice of the Common Pleas) were liked in their Courts; he says the first is very great in his manner of doing business. His summing-up is very instructive, but takes too much time, as he gives his full reasons for his judgment in all cases, which can never get on, and he complains that he finds it hard work. Lord Alvenley does extremely well in his business, but talks to the jury and witnesses so much it lets down the dignity of the Court, and as this is more public than the Rolls, it is much to be lamented."

THEFT OF ELECTRICITY.—The *Electric Review* credits a German Court with an extraordinary decision to the effect that electricity cannot be stolen. The charge was that the accused had tapped an electric light company's main, and stolen several thousand ampères of electricity, which he had used to run a motor; and the Court, on appeal, held that in Germany "only a movable material object" could be stolen, and consequently the accused was acquitted.

LORD BOWEN AND AUTHORSHIP.—*A propos* of Lord Bowen, says the *Law Journal*, it is a curious thing that he should never have written a law-book. He had the literary faculty strong in him. He had scholarship, culture, and learning. Who could have been better qualified to illuminate some branch of English law? But the desire of attaining immortality in that way seemed to him a 'doubtful passion.' 'You write a history of law or a treatise about it, and then a puff of reform comes and alters it all, and makes your history or treatise useless.' But is not this desponding philosophy just as true of the writing of books on any progressive science? The historian formulates his theory, say, of the early history of Rome. New records come to light, and the theory has to be reconstructed. A philosopher like Locke gives us a theory about the human mind. Later psychology upsets it, but would we wish the "Essay on the Human Understanding" unwritten? Blackstone's work, as Sir Frederick Pollock says, must be done over again, in the light of the records which the Selden Society is producing and of comparative jurisprudence, but have those splendid "Commentaries" been written in vain; or is "Ancient Law" less an epoch-making book because Sir Henry Maine's conclusions may not be final? No! the work of Niebuhr and Locke and Blackstone and Maine has served its purpose in systematising by their generalisations all the knowledge that was available at their respective periods. They have made the work which supersedes them possible. The only true immortality belongs to poets—and law reporters.

CONTEMPT OF COURT.—In *Seaward v. Paterson*, the Court of Appeal, in affirming the decision of Mr. Justice North committing a man to prison for contempt of Court by disobeying an injunction, have in appearance somewhat enlarged the law as to contempt. The injunction forbade the continuance by Paterson, his servants and agents, of certain glove fights at the Queensberry Club, which had been adjudged to be a private nuisance (cf. *The Pelican Club Case* (1890), 7 Times L.R. 135). One Murray, not a party to the action, but having notice of the injunction, continued the nuisance, and the result of his so doing has been a decision that any person aiding and abetting disobedience to an injunction of which he has notice, whether he is or is not a party to the action in which it is granted, and whether he is or is not a servant or agent of the party enjoined,

is liable to attachment or committal for contempt of Court. In other words, the common law and statutory rules applicable to misdemeanours generally also extend to contempt of Court, even though the contempt, as in the present case, is not held to be in a criminal cause or matter.—*Ib.*

CANADIAN LAW BOOKS IN LONDON.—A Canadian Law Library has been established in London. Statutes, reports, and gazettes have been received by the librarian, Mr. S. V. Blake, from the Dominion and most of the provinces, and a valuable collection of French law works has been lent to the library. The library occupies a modest apartment at 17 Victoria Street, Westminster, in the same building with the office of the High Commissioner for Canada, and will doubtless be found a great convenience by the members of the Canadian profession who visit London.

MR. ODGERS, Q.C.—This gentleman, who is well known as a specialist on the law of libel and slander, has been appointed Recorder of Winchester. Mr. Blake Odgers is the son of a distinguished Unitarian minister, who preached at Plymouth during twenty years and at Bath for a similar period. The newly appointed Recorder is himself a leading member of the same religious body, being a vice-president of the British and Foreign Unitarian Society, and the treasurer of the Unitarian Sunday School Association. He was born at Plymouth forty-eight years ago, and was educated at King Edward's Grammar School in Bath and at University College, London. His career at Trinity College, Cambridge, was a very successful one. A few years later he obtained the degree of LL.D. at Cambridge and of B.A. at London. Both universities have honoured him in his professional capacity. He was for three years an examiner for the Law Tripos at Cambridge, and he holds the position of examiner in common law at the University of London. He was called to the Bar at the Middle Temple in 1873, and joined the Western Circuit. The honour of silk was conferred upon him in 1893.

INCREASE OF POPULATION DESIRED.—The *London Law Journal* says:—France is beginning to awaken to the dangers of depopulation, and, like Rome, is seeking the remedy in the encouragement of marriage—perhaps it would be more correct to say in the removal of obstacles to marriage. That acute

observer, M. Taine, finds in old Capulet and his rough words to the fair Juliet the type of the British father, and sees corroborative traces of his domineering temper in the fact that the English son still speaks of his father as "the Governor." But in truth the *patria potestas* is far more potent with the Latin races than with ourselves. The young Frenchman who wishes to marry the lady of his choice is not emancipated even at the mature age of twenty-five. If his parent disapproves he must present an *acte respectueux*, drawn up by a notary, soliciting permission, and if it is not accorded he must go on presenting *actes respectueux* year after year. No romance, however sublime, can stand much of this sort of thing, and the fruit of it is found in the multiplication of irregular unions. In the hope of checking these the French Legislature has limited the *actes respectueux* to one and dispensed with the notary—that expensive luxury—together. Let us hope that youths and maidens will appreciate these concessions and flock to the hymeneal altar, but when once the anti-matrimonial tendency has set in in an over-ripe civilization, bachelor taxes or premiums on matrimonial engagements are apt to have little efficacy."

X RAY PICTURES AS EVIDENCE.—A District Court of Colorado has had occasion to determine the rule of law governing the admission in evidence of shadowgraphs or photographs made by what is known as the cathode or X-ray process. The Court held such photographs were admissible as secondary evidence upon the same ground as maps or drawings. A similar conclusion was arrived at in an English Court of Justice many months ago.

ACCIDENT INSURANCE.—A curious case has arisen in Paris. M. Henri Martin, chief editor of the *Courrier de Lyon*, was found dead in his room, hanging from a cord passed over a hook in the ceiling and attached to a dog-collar around his neck. His life was insured for 30,000 francs, which the insurance company refuses to pay on the ground that he committed suicide. He had, however, been publishing articles on the scientific side of hanging, and was preparing one describing the sensations of a hanged man. The counsel for his family will contend that he was making experiments on himself, and that his death was accidental.

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SUPREME COURT OF CANADA.

OTTAWA, 7 June, 1897.

GAUTHIER V. MASSON.

Quebec.]

Action on disturbance—Possessory action—"Possession annale"—Arts. 946 and 948, C.C.P.—Nature of possession of unenclosed vacant lands—Boundary marks—Delivery of possession.

In 1890, G. purchased a lot of land 25 feet wide, and the vendor pointed it out to him, on the ground, and showed him the pickets marking its width and depth. The lot remained vacant and unenclosed up to the time of the disturbance, and was assessed as a 25 foot lot to G., who paid all municipal taxes and rates thereon. In 1895, the adjoining lot, which was also vacant and unenclosed, was sold to another person, who commenced laying foundations for a building, and in doing so, encroached by two feet on the width of the lot so purchased by G., who brought a possessory action within a couple of months from the date of the disturbance.

Held, that the *possession annale*, required by article 946 of the Code of Civil Procedure, was sufficiently established to entitle the plaintiff to maintain his action.

Appeal allowed with costs.

Belcourt, for the appellant.

Madore and Merrill, for the respondents,

7 June, 1897.

ROBERTSON V. DAVIS.

Quebec.]

Action—Suretyship—Promissory note—Qualified indorsement.

D. indorsed two promissory notes, *pour aval*, at the same time marking them with the words "not negotiable and given as security." The notes were intended as security to the firm of A. & R. for advances to a third person on the publication of certain guide books which were to be left in the hands of the firm as further security, the proceeds of sales to be applied towards reimbursement of the advances. It was also agreed that payment of the notes was not to be required while the books remained in the possession of the firm. The notes were protested for non-payment, and A. having died, R., as surviving partner of the firm and vested with all the rights in the notes, sued the maker and indorser jointly and severally for the full amount. At the time of the action, some of the books were still in the possession of R., and it appeared that he had not rendered the indorser any statement of the financial situation between the principal debtor and the firm.

Held, that the action was not based upon the real contract between the parties, and that the plaintiff was not, under the circumstances, entitled to recover in an action upon the notes.

Held, further, *per* Girouard, J., that neither the payee of a promissory note nor the drawer of a bill of exchange can maintain an action against an indorser, where the action is founded upon the instrument itself.

Appeal dismissed with costs.

Greenshields, Q. C., and *Lafleur*, for the appellant.

Macmaster, Q. C., for the respondent.

7 June, 1897.

MCGOY V. LEAMY.

Quebec.]

Agreement respecting lands—Boundaries—Referee's decision—Borne—Arbitration—Arts. 941-945 and 1341 et seq. C.C.P.

The owners of contiguous farms executed a deed for the purpose of settling a boundary line between their lands, thereby naming a third person to ascertain and fix the true division line

upon the ground, and agreeing further to abide by his decision and accept the line which he might establish as correct. On the conclusion of the referee's operations one of the parties refused to accept or act upon his decision, and action was brought by the other party to have the line so established declared to be the true boundary and to revendicate the strip of land lying upon his side of it.

Held, reversing the judgment of the Court of Queen's Bench, that the agreement thus entered into was a contract binding upon the parties to be executed between them according to the terms therein expressed, and was not subject to the formalities prescribed by the Code of Civil Procedure relating to *bornage* or arbitration.

Appeal allowed with costs.

Foran, Q. C., for the appellant.

Geoffrion, Q. C., (*Champagne* with him) for the respondent.

7 June, 1897.

TURCOTTE V. DANSEREAU.

Quebec.]

Action—Service of—Judgment by default—Opposition to judgment—Reasons of—“Rescisoire” joined with “Rescindant”—Arts. 16, 89, et seq. 483, 489, C.C.P.—False return of service.

No entry of default for non-appearance can be made, nor *ex parte* judgment rendered, against a defendant who has not been duly served with the writ of summons, although the papers in the action may have actually reached him through a person with whom they were left by the bailiff.

The provisions of articles 483 and following of the Code of Civil Procedure of Lower Canada relate only to cases where a defendant is legally in default to appear or to plead, and have no application to an *ex parte* judgment rendered, for default of appearance, in an action which has not been duly served upon the defendant, and the defendant may at any time seek relief against any such judgment and have it set aside notwithstanding that more than a year and a day may have elapsed from the rendering of the same, and without alleging or establishing that he has a good defence to the action on the merits,

An opposition asking to have a judgment set aside, on the ground that the defendant has not been duly served with the action, which also alleges the defendant's grounds of defence upon the merits, should not be dismissed merely for the reason that the *rescisoire* has thus been improperly joined with the *rescindant*.

Appeal allowed with costs.

Languedoc, Q. C., for the appellant.

Lajoie, for the respondent.

7 June, 1897.

VALADE V. LALONDE.

Quebec.]

Sale—Donation in form of gift in contemplation of death—Mortal illness of donor—Presumption of nullity—Validating circumstances—Dation en paiement— Arts. 762, 989, C. C.

During her last illness and a short time before her death, B. granted certain lands to V., by an instrument purporting to be a deed of sale, for a price therein stated, but in reality the transaction was intended as a settlement of arrears of salary due by B. to the grantee, and the consideration acknowledged by the deed was never paid.

Held, reversing the decision of the Court of Queen's Bench, that the deed could not be set aside and annulled as void, under the provisions of article 762 of the Civil Code, because the circumstances tended to show that the transaction was actually for good consideration (*dation en paiement*), and consequently legal and valid.

Appeal allowed with costs.

Geoffrion, Q. C., and *Beaudin*, Q. C., for appellant.

Madore, for the respondents.

7 June, 1897.

CHARLEBOIS V. SURVEYER.

Quebec.]

Malicious prosecution—Probable cause.

S., being a holder of a promissory note endorsed to him by the payees, sued to recover the amount, but his action was dismissed

upon evidence that it had never been signed by the person whose name appeared as maker, nor with his knowledge or consent, but had been signed by his son without his authority. The son's evidence on the trial of the suit was to the effect that he never intended to sign the note, and if he had actually signed it with his father's name, it was because he believed that it was merely a receipt for goods delivered by express. Immediately after the dismissal of the suit, S. wrote to the payees asking them if they would give him any information which would help him in laying a criminal charge in order to force payment of the note and costs. He also applied to the express company's agent, by whom the goods were delivered and the note procured, and was informed that there was a receipt for the goods, but that the signature was denied, and could not be proved. However, without further inquiry, and notwithstanding the warning of a mutual friend against taking criminal proceedings, S. laid an information against the son for forgery. The police magistrate at Montreal, upon the investigation of the charge, declared it to be unfounded and discharged the prisoner.

Held, reversing the judgments of both courts below, that under the circumstances, the prosecution was without reasonable or probable cause, and the plaintiff was entitled to substantial damages.

Appeal allowed with costs.

Saint-Pierre, Q. C., for the appellant.

Geoffrion, Q. C., and *Beaudin, Q. C.*, for the respondent.

7 June, 1897.

GUERTIN V. GOSSELIN.

Quebec.]

*Collocation and distribution—Appeal against—Art. 761, C.C.P.—
Hypothecary claims — Assignment — Notice — Registration —
Prête nom—Arts. 20 and 144 C.C.P.—Action to annul deed—
Parties in interest—Incidental proceedings.*

The appeal from judgments of distribution under article 761 of the Code of Civil Procedure is not restricted to the parties to the suit, but extends to every person having an interest in the distribution of the moneys levied under the execution.

The provision of article 144 of the Code of Civil Procedure, that every fact of which the existence or truth is not expressly denied or declared to be unknown by the pleadings filed shall be held to be admitted, applies to incidental proceedings upon an appeal in the Court of Queen's Bench.

The nullity of a deed of assignment can only be invoked by proceedings to which all persons interested in the deed have been made parties.

Appeal allowed with costs and case remitted for hearing on the merits.

Béique, Q. C., and *Lafontaine, Q. C.*, for the appellant.

Geoffrion, Q. C., (*Paradis* with him) for the respondent.

7 June, 1897.

DAVIS V. CITY OF MONTREAL.

Quebec.]

Master and servant—Hiring of personal services—Municipal corporations—Appointment of officers—Summary dismissal—Libellous resolution—Statute, Interpretation of—Difference in text of English and French versions—52 Vic. c. 79, s. 79 (Q.)—"A discrétion"—"At pleasure."

The charter of the City of Montreal, 1889, (52 Vict. ch. 79), section 79, gives power to the city council to appoint and remove such officers as it may deem necessary to carry into execution the powers vested in it by the charter, the French version of the act stating that such powers may be exercised "*à sa discrétion*," while the English version has the words "*at its pleasure*."

Held, that notwithstanding the apparent difference between the two versions of the statute, it must be interpreted as one and the same enactment, and that the city council was thereby given full and unlimited power in cases where the engagement has been made indefinitely as to duration, to remove officers summarily and without previous notice, upon payment of only the amount of salary accrued to such officer up to the date of such dismissal.

Appeal dismissed with costs.

Madore, for the appellant.

Ethier, Q. C., for the respondent.

7 June, 1897.

DEMERS V. MONTREAL STEAM LAUNDRY CO.

Quebec.]

Appeal—Questions of fact—Second appellate court.

Where a judgment upon questions of fact rendered in a court of first instance has been reversed upon a first appeal, a second court of appeal should not interfere to restore the original judgment, unless it clearly appears that the reversal was erroneous.

Appeal dismissed with costs.

Geoffrion, Q. C., and Goyette, for the appellant.

McGibbon, Q. C., for the respondent.

7 June, 1897.

GUERTIN V. SANSTERRE.

Quebec.]

Building societies—Participating borrowers—Shareholders—C.S. L.C., c. 69—42 and 43 V. c. 32—Liquidation—Expiration of classes—Assessments on loans—Notice of—Interest and bonus—Usury laws—C.S.C., c. 58—Art. 1785, C.C—Administrators and trustees—Sales to—Prête nom—Art. 1484 C.C.

S. applied to a building society for a loan of \$3,500, which was subsequently advanced to him upon signing a deed of obligation and hypothec submitting to the conditions and rules applicable to the society's method of carrying on their loaning business, and declaring that he had become a subscriber for shares in the company's stock for an amount corresponding to the amount of the loan, namely 70 shares of the nominal value of \$50 each in a class to expire after 72 monthly payments, or in six years from the date of its commencement (July, 1878), this term corresponding with the term fixed for the repayment of the loan. He thereby also agreed to make monthly payments of one per cent. each upon the stock and that the loan should be repaid at the expiration of the class, when, upon the liquidation of the business of that class, members would be entitled to the allotment of their shares subscribed as paid up, partly by the monthly instalments and partly by accumulated profits to be derived from whatever moneys had been paid in and invested for the benefit of that

class, at which time, whatever he might be so entitled to receive in shares of stock should be credited towards the reimbursement of the loan. He further obliged himself to pay, as interest and bonus, the additional sum of one per cent. upon the loan by similar monthly instalments during the time it remained unpaid. S. paid all the instalments by semi-annual payments of \$420 each, until 1st May, 1884, making a total of seventy monthly instalments of \$70 each, leaving two more instalments of each kind still to become due before the date originally fixed for the termination of his class. The society went into liquidation under the provisions of 42 and 43 Vic. (Quebec,) ch. 32 in January, 1884, prior to A's last payment and about six months before the date fixed for the expiration of his loan. In October, 1884, the liquidators of the society, in the exercise of the powers vested in the directors under the deed and the society's regulations, passed a resolution declaring a deficit in business of the class to which A. belonged, and, in order to provide the necessary funds to meet the proportion of deficit attributed as his share, they thereby exacted from him a further series of twenty-eight monthly payments in addition to the seventy-two instalments contemplated at the time of the execution of the deed. Subsequently, (in 1892), the plaintiff as transferee of the society, brought action for the two original instalments remaining unpaid, and also for the amount of the twenty-eight additional monthly payments upon the loan and the subscription of shares.

Held, that the subscription for shares and the obligation undertaken in the deed constituted, upon the part of the borrower, merely one transaction involving a loan and an agreement to repay the amount advanced with interest and bonuses thereon, amounting together to a rate equivalent to interest at twelve per centum per annum on the amount of his loan; that the fact of the building society going into liquidation had the effect of causing all classes of loans then current to expire at the date when the society was placed in liquidation, notwithstanding that the various terms for which such classes may have been established had not been fully completed; that under the provisions of the statute, 42 and 43 Vic. (Quebec,) ch. 32, liquidators have the same powers in regard to the determination of the affairs of expired classes and to declare deficits therein and to call for further payments to meet the same, as the directors of the society had while it continued in operation; that the notice re-

quired by the twenty-first section of the Act, 42 and 43 Vic. (Quebec,) ch. 32, does not apply to cases where liquidators have determined a loss upon the expiration of a class and required the full amount exigible upon loans to be paid by borrowers; that, notwithstanding that the liquidation proceedings deprived the directors of the exercise of their powers as to the determination of the condition of the affairs of a class and of the exaction of a further payment when exigible in such cases on the expiration of a class, the resolution of the liquidators determining a deficit in the borrower's class, and requiring full payment of all sums exigible under his deed of obligation, was sufficient to constitute a valid right of action against the borrower for the amount of the balance of principal money loaned together with the interest and bonus instalments remaining due thereon according to the terms and conditions of his deed of obligation. (Judgment of the Court of Queen's Bench reversed.)

Held, further, affirming the decisions of both Courts below, that in an action where no special demand to that effect has been made, the Court cannot declare the nullity of a deed of transfer alleged to have been made in contravention of the provisions of Article 1484 of the Civil Code.

Appeal allowed with costs.

Trenholme, Q. C., and *Béique, Q. C.*, for the appellants.

Geoffrion, Q. C., and *P. H. Roy*, for the respondents.

1 May, 1897.

[Ontario.]

BROUGHTON v. TOWNSHIP OF GREY ET AL.

Municipal law—Drainage—Assessment—Inter-municipal obligations—By-law—Ontario Drainage Act of 1873—36 Vict., c. 38 (O); 36 V., c. 39 (O); R.S.O. (1887) c. 184—Ontario Consolidated Municipal Act of 1892—55 V., c. 42 (O).

Where the council of a municipality assumed to pass a by-law under section 585 of the Consolidated Municipal Act of Ontario (55 Vic., ch. 42) for the construction, maintenance and repair of drainage works, and thereby to charge and assess lands in an adjoining municipality for benefit as for outlet, in order to raise the funds necessary to meet the cost of such works,

Held, reversing the judgment of the Court of Appeal for Ontario, (23 Ont. App. Rep. 601) and of the Division Court (26

O. R. 694) that as the drain only emptied into a natural stream extending into the adjoining municipality, the lands in said adjoining municipality purported to be affected by such by-law were not assessable for a liability thereunder to contribute towards the cost of the works, and so far as they were concerned the by-law was *ultra vires* of the initiating municipal corporation; and that a person whose lands might appear to be affected thereby or by any by-law of the adjoining municipality proposing to levy contributions toward the cost of such works, would be entitled to have the adjoining municipality restrained from passing a contributory by-law or taking any steps towards that end by an action brought before the passing of such contributory by-law.

Appeal allowed with costs.

Mabee, for the appellant.

Garrow, Q. C., for respondent Grey.

McPherson, for respondent Elma.

OTTAWA, 1 May, 1897.

Privy Council Reference]

IN RE CRIMINAL CODE, 1892, BIGAMY SECTIONS, 275-276.

Constitutional law—Criminal Code, ss. 275-276—Bigamy—Canadian subject marrying abroad—Jurisdiction of Parliament.

Sections 275 and 276 of the Criminal Code of 1892, respecting the offence of bigamy, are *intra vires* of the Parliament of Canada. *Macleod v. Atty. Genl. of New South Wales* (1891, C.C. 445) distinguished. Strong, C.J., *contra*.

Newcombe, Q. C., Deputy Minister of Justice, for Government of Canada.

RECENT U.S. DECISIONS.

Strikes.—A patrol of strikers in front of a factory is held, in *Vegelahn v. Guntner* (Mass.) 35 L.R.A. 722, to be a private nuisance when instituted for the purpose of interfering with the business, and it is no justification that the motive or purpose of the strikers is to secure better wages.

Contracts.—The law as to contracts against public policy is held, in *Doane v. Chicago City R. Co.* (Ill.) 35 L.R.A. 588, to be applicable to a contract by which a street railway company purchases the consent of a majority of the owners of the frontage

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the picture was taken two years later, after the situation had changed, and a map made near the time was already in evidence. With these cases are reviewed the other authorities on the use of photographs in evidence.

Innkeeper.—For thefts by hotel employees from guests while asleep in rooms assigned them at a hotel, even if they are intoxicated, it is held, in *Cunningham v. Buckey* (W. Va.) 35 L.R.A. 850, that the innkeeper is liable.

Mutual Benefit Society.—The right to reinstatement after forfeiture of membership in a mutual benefit society for default of payments is held, in *Carlson v. Supreme Council American Legion of Honor* (Cal.) 35 L.R.A. 643, to be terminated by the death of the member without payment during the time allowed for reinstatement, and a subsequent tender by the beneficiary within that period is unavailing.

Insurance.—So long as the remnant of a building which is left standing is reasonably adapted for use as a basis upon which to restore the building to the condition in which it was before injury, it is held, in *Royal Ins. Co. v. McIntyre* (Tex.) 35 L.R.A. 672, that there is no total loss.

An insurable interest in the life of a son-in-law is held, in *Adams v. Reed* (Ky.) 35 L.R.A. 692, to exist in favor of a woman who with him as one family keeps a boarding house, dividing the profits between them.

Total blindness resulting from accident is held, in *Moge v. Soci  t   de Bienfaisance* (Mass.) 35 L.R.A. 736, to be within the provisions of a policy providing for weekly benefits when one is "incapable of working" by reason of accident.

Exemptions from seizure.—The exemption of the books of a lawyer from execution is held, in *Equitable Life Assur. Soc. v. Goode* (Iowa) 35 L.R.A. 690, to exist in favor of a lawyer who gives some time to the work of his profession which contributes to his support, even if he does not appear in court, advertise as a lawyer, or earn his living by services as a lawyer.

Promissory note.—A corporate seal on a note which is negotiable in form is held, in *Chase Nat. Bank v. Faurot* (N.Y.) 35 L.R.A. 605, not to destroy the negotiability of the instrument. A note to the case reviews the previous authorities on the effect of a seal on negotiability.

The addition of the word "trustee" to the name of the payee of a note is held, in *Fox v. Citizens Bank & T. Co.* (Tenn.) 35 L.R.A. 678, not to destroy its negotiability. The other authorities on this question are reviewed in the annotation to the case.

The holder of a note who takes it entirely on the security of a policy of life insurance, although it is technically delivered prior to maturity, is held, in *Hays v. Lapeyre* (La.) 35 L.R.A. 647, to be entitled to hold the note only for the amount advanced upon it, with interest. The annotation to this case considers the negotiability of a note payable out of a particular fund.

The indorsement by the maker of a note which is payable to his own order is held, in *Ewan v. Brooks-Waterfield Co.* (Ohio) 35 L.R.A. 786, not to be an indorser in the legal sense of the term, but only a maker, and the note is held to be in legal effect payable to the holder or bearer. In such a case an indorsement in blank by another party before the note is delivered is held to make the latter a *prima facie* surety of the maker.

Railway.—A railroad company selling coupon tickets over connecting roads is held, in *Chicago & A. R. Co. v. Mulford* (Ill.) 35 L.R.A. 599, to be presumably a mere agent for the connecting companies, and not liable for the failure of the latter to honor the tickets.

A person at a flag station at which there is no ticket office, who has signified an intent to get upon a passenger train that has actually stopped there, is held, in *Western & A. R. Co. v. Voils* (Ga.) 35 L.R.A. 655, to be entitled to the rights of a passenger.

The negligence of a passenger in stepping on a train when it is going two or three miles an hour is held, in *Distler v. Long Island R. Co.* (N. Y.) 35 L.R.A. 762, to be a question for the jury.

The duty of furnishing a separate passenger train for passengers only, and not for freight and passengers together, is held, in *People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co.* (Ill.) 35 L.R.A. 656, to be implied in the duty of a railroad company to furnish necessary rolling stock and equipment for the suitable operation of the road. The sufficiency of earnings to justify the expense of such a train is held to depend on the earnings of the entire system, and not of the mere branch over which the train is to run.

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ordinance to compel a railroad company at its own expense to employ a watchman and maintain gates where the tracks cross a highway under penalty for failure to do so is held, in *Pittsburg, & St. L. R. Co. v. Crown Point* (Ind.) 35 L.R.A. 684, to be valid under a general grant of power to regulate travel on the roads, and enact ordinances for the protection of life, health and property.

Carrier.—The effect of a strike on the liability of a charterer of a railway in unloading is considered in *Empire Transportation Co. v. Philadelphia & R. C. & I. Co.* (C.C. App. 8th C.) 35 L.R.A. 687, where it is held that he is not negligent in chartering a train after its employees have struck if there are plenty of other men ready to work if not prevented by intimidation and force, and that he is not required to pay 25 per cent above the market price to strikers who have abandoned the employment at a critical time, and use intimidation and force to prevent others from working, or to agree not to employ faithful and willing laborers. The effect of strikes upon the rights and liabilities of a carrier is considered in a note to this case.

Insurance.—A temporary breach of an insurance policy by the insured during the hazard is held, in *Traders' Ins. Co. v. Catlin* (Ill.) 35 R.A. 595, to leave the policy in force after the extra risk has passed, if this did not contribute to a subsequent loss.

WIFE SUE HER HUSBAND FOR LIBEL?

Justice Kennedy gave judgment at Liverpool recently in the case of *Robinson v. Robinson*, an action for damages for libel brought by a wife against her husband, in which Mr. Langdon was the plaintiff and Mr. Jordan for the defendant. The case was tried at Manchester. The learned judge's written judgment contained the following: "This is an action by a wife against her husband for libel. The facts of the case are not in dispute, and by consent the case was taken before myself without a jury. The plaintiff in September last obtained a separation order under the provisions of the Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict., c. 39). After that time she lived apart, and was receiving from him under the order a weekly payment of 18s. At a certain time after the order had been made she accepted the assistance of a cousin, Mrs. Partington, who was the licensee of

the Castle Hotel, Clitheroe, to come to reside with her there, paying nothing for her board and lodging, but giving at her will some help in the management of Mrs. Partington's business in the hotel. Whilst the plaintiff was living under the said circumstances at the Castle Hotel the defendant sent her by telegraph the three messages which are the libels complained of in this action. Of the defamatory import of these messages, which in disgusting terms imputed to her sexual immorality, there is no question, nor, inasmuch as they were telegraphic messages, is there any question as to publication. The plaintiff showed them after their arrival to Mrs. Partington, and that lady, although she was much attached to the plaintiff, felt obliged, after reading the third telegram, to ask the plaintiff to leave her house. The plaintiff thereupon commenced the present action against the defendant. She does not ask for substantial damages. Her aim is by obtaining an injunction to prevent the repetition of this injurious and insulting conduct on the part of the defendant. The facts are not disputed by the defendant. There is no justification for the libels. His defence to the action is that, in point of law, it is not maintainable. He contends that, as these libels are libels upon the plaintiff's personal character, and not in regard to her business or property, and she is therefore not suing him, "for the protection and security of her own separate property" within the meaning of the Married Women's Property Act, 1882, s. 12, the action is one of tort, which, as a married woman, although separated from him by the magistrate's order, she cannot bring against her husband. I agree with the defendant's counsel that the plaintiff is not helped by the last-mentioned enactment. The question is this. Can the plaintiff, not being enabled to do so by the Married Women's Property Act, 1882, sue the husband for a libel? The inability in general of the wife to sue her husband for a tort is founded not merely upon a rule of legal procedure necessitating the joinder of the husband as a co-plaintiff, but upon the principle that husband and wife form in the eye of the law one person. This was expressly decided in *Phillips v. Barnett*, 45 Law J. Rep. Q. B. 277; L. R. 1 Q. B. Div. 436. Unless, therefore, this is affected by the peculiar position of the plaintiff as a wife who has obtained a separation order, the defendant is apparently entitled to succeed in the present action. Is it so affected? This depends upon the effect to be given to certain provisions of the Summary Juris-

diction (Married Women) Act, 1895, under which the separation order was made, and the Divorce and Matrimonial Causes Act, 1857.....A libel by a husband upon a separated wife must in most cases be especially injurious to her. In the absence of any authority, it appears to me, looking at the plain intention of the statute, to give the judicially separated wife full power, as a *feme sole*, to protect herself by action against all wrongs and injuriesI give judgment for the plaintiff, with costs, for 20s. as nominal damages, as she does not ask for substantial damages, and an injunction against the repetition of the libels complained of."

GENERAL NOTES.

THE LORD'S DAY.—The Sunday Observance Act of 1781 must be drawing near its end when the *Times* is prosecuted for advertising a Sunday concert, to which admission is free, but reserved seats are charged for. The plaintiff, who sued as a common informer in the interests of the due observance of the Lord's Day, elected to affirm instead of taking the oath, on the ground that he had no religious belief whatever. We presume that he had left a last surviving superstition—viz. belief in the sanctity of the Sabbath coupled with the usual confusion of it with Sunday. The case had a good result, however, in that Mr. Justice Collins held that as admission to the entertainment was free, charging for reserved seats did not bring the entertainment within the Act, unless the informer could prove that there were no free seats.—*Law Journal (London)*.

UNKNOWN OFFENDERS.—In a case before him at Bow Street on August 2, Mr. Lushington made a quite unnecessary difficulty about granting a summons against a person whose name was unknown to the informant. There has never been any difficulty even from the earliest time in indicting a person "whose name is to the jurors unknown," for killing, or stealing from, a person to them unknown; and there is no reason why the same rule should not apply in cases tried summarily by justices, provided that sufficient care is taken to give in the information an adequate description of the incriminated person, and that he should not be arrested or served with a summons except in the presence of a person able to identify him as the alleged offender. *Ib.*

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CURRENT TOPICS.

During the vacation the retirement of a judge of the Superior Court has taken place, and also the death of an ex-judge. Mr. Justice Brooks, of Sherbrooke, whose retirement from the Bench occurred about two years ago, died on the 5th August, from apoplexy. The deceased was born in 1830, and was admitted to the Bar in 1854. In 1875 he was made a Queen's Counsel. In that year he was *bâtonnier* of the Bar of St. Francis district. In 1882 he was appointed judge of the Superior Court for the St. Francis district, and he retained this office until he was obliged to retire, in 1895, owing to ill-health. Mr. Justice Brooks as an advocate made his mark, and enjoyed a large practice. On his elevation to the Bench he had to deal with the business presenting itself in a large and growing community, and which taxed his strength to the utmost extent. Many of his decisions have appeared in the pages of this journal, and for the most part we think they will be found well considered and correct in the conclusions arrived at. As a judge the deceased was highly esteemed by the Bar, for his courtesy and careful attention to the arguments of counsel, and in private life he enjoyed the respect and consideration of his fellow-citizens.

A change on the Bench of the Superior Court has been caused by the retirement of Mr. Justice Malhiot, of the Ottawa district, who was unhappily obliged to retire owing to the loss of his sight. Judge Malhiot's sight has been failing for several years, and some time ago he visited Paris to consult specialists, but without success. The judge will have the sympathy of the Bar in the affliction which has befallen him.

Mr. Justice Malhiot's place has been filled by Mr. J. Lavergne, law partner of Sir Wilfred Laurier, the Premier of Canada. Mr. Lavergne was called to the Bar in 1872, and has practised in the district of Arthabaska.

An illustration of the expedition with which a case may pass through all the courts, including the final appeal to the Privy Council, is afforded by *City of Montreal and Standard Light & Power Co.*, reported in the present issue. The judgment of their Lordships of the Privy Council was rendered on the 3rd August, 1897, and, as will be observed by the opening remarks of Lord Macnaghten, who rendered the judgment, the incidents which led to the litigation occurred on the 10th September preceding. The judgment of Acting Chief Justice Tait was rendered on the 21st September, 1896, and the judgment of the Court of Queen's Bench, affirming the decision, on the 3rd October. This case shows that in the matter of expeditious administration of justice, the province of Quebec takes a very high place.

The second meeting of the Canadian Bar Association was held at Halifax on August 31. The president, Hon. J. E. Robidoux, Q.C., delivered an address. The meeting was well attended. Several of the judges of Nova Scotia were present during part of the sittings.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, 31 July, 1897.

PRESENT:—LORD MACNAGHTEN, LORD MORRIS, SIR RICHARD COUCH, SIR HENRY STRONG.

DAME CHARLOTTE DE HERTEL (opposant in first instance), appellant, & DAME EMILY C. GODDARD ET AL. (intervenants continuing suit in first instance), respondents.

Will—Interpretation—Substitution—Suspension by condition.

C. devised certain real estate to R., and after R's death to R's two daughters, M. and A., and to her niece T., conjointly and in equal shares, to be enjoyed by them during their natural life, and after their decease to their children respectively, in full and entire property, share and share alike. If two of the three persons named above should die without children the property was to go and belong to the child or children of the survivor. R. received the property and enjoyed it until her death, when M., A. & T. received it and enjoyed it jointly until the death of M. without children, and then A. and T. continued to enjoy the whole until A. also died without issue. One half of the share of M. (one-sixth of the whole) was now claimed, on the one hand, by the child of T. as her heir, and, on the other hand, by the universal legatee of A.

HELD (affirming the judgment of the Court of Queen's Bench, Montreal, which affirmed the judgment of the Court of Review, Montreal, R. J. Q., 8 C. S. 72):—*The will did not create, as between M., A. and T., a gradual substitution, under which the share of any one of them dying without issue would pass to the other two, and upon the death of a second of them, also without issue, the whole would vest in the third; but on the death of M. any further substitution of her share created by the will remained suspended, pending the fulfilment of the condition upon which it was made dependent, namely, that two of the three persons, M., A. and T., substitutes in the first degree, should die leaving no children, which further substitution only took effect upon the fulfilment of the condition by the death of A. without children. Hence no portion of the share of M. ever passed to or was vested in A. as substitute in the second degree, and she was unable to transmit it by her will.*

The appeal was from a judgment of the Court of Queen's Bench, Montreal, 25 February, 1896, affirming a judgment of the Court of Review, Montreal, 19 June, 1895, reported in R. J. Q., 8 C. S. 72. The judgment of the Court of Review reversed the decision of the Superior Court, Montreal, Archibald, J., 8 June, 1894, reported in R. J. Q., 6 C. S. 101.

LORD MACNAGHTEN:—

Having regard to the law of the province of Quebec in refer-

ence to substitutions created by will, a question now arises as to the meaning and effect of a devise in the will of the late William Plenderleath Christie who died in 1845.

The devise is in the following terms :

"I.....deviseto.....Katherine Robertson of Montreal, widow, during her natural life, and after her decease to her daughters Mary and Amelia Robertson and to her niece Mary Elizabeth Tunstall, conjointly and in equal shares, to be enjoyed by them during their natural life and after their decease to their children respectively born in lawful wedlock, in full and entire property, share and share alike.....the seigniorie de Leryin the.....Province of Canada.....I desire if two of the three persons Mary Robertson, Amelia Robertson, and Mary Elizabeth Tunstall shall die without such children that.....the seigniorie.....shall go and belong to the child or children of the survivor in full and entire property." And the testator then directed that if all three—Mary Robertson, Amelia Robertson, and Mary Elizabeth Tunstall—should die without such child or children, the seigniorie should be sold and the proceeds divided between certain religious societies named in the will.

Katherine Robertson, the mother of Mary and Amelia Robertson and the aunt of Mary Elizabeth Tunstall, survived the testator and died in 1858.

Mary Robertson died, without having been married, in 1876.

Amelia Robertson died, without having been married, in February, 1891.

Mary Elizabeth Tunstall, the survivor of the three substitutes in the first degree, married one Edward Roe, and died in October 1891, leaving an only child, Alfred Edward Roe, who is now dead.

The appellant is the representative of Amelia Robertson. In her right the appellant claims to be entitled to one moiety of the share given to Mary Robertson for life, or in other words to one sixth of the whole estate.

The respondents, who represent Alfred Edward Roe, maintain that on the death of Mary Elizabeth Tunstall, the estate in its entirety devolved on her only child Alfred Edward Roe.

It is not disputed that the French law in force in the Province at the time of the cession of the country prohibited more than three degrees in substitutions created by will. The law as declared in the Civil Code of Lower Canada is to the same effect,

Article 932 provides that substitutions created by will "cannot extend to more than two degrees exclusive of the institute." That article however appears to be marked as new law. And the learned counsel for the respondents intimated that they were prepared to argue that at the time when the will came into operation there was no restriction on the number of degrees in substitutions created by will. The contention which they proposed to raise was that during the interval between the commencement of the Act of 1801 (41 George III. cap. 4) and the 1st of August, 1866, when the Civil Code came into force, there was unlimited freedom of disposition by will. But their lordships did not think it necessary to embark in so far reaching an inquiry in the present case.

Assuming for the purpose of the argument that only three degrees of substitution were permissible by law at the time when the testator's will came into operation, how many degrees are to be reckoned in the transmission of the estate from the testator to Alfred Edward Roe in regard to the share of Mary Robertson? From Katherine Robertson, the institute, to Mary Robertson is one degree. From Mary Robertson to Alfred Edward Roe, apparently, is not more than one degree. The learned counsel for the appellant however discover another degree in the interval between the death of Mary Robertson without issue, and the opening of the succession in favour of Alfred Edward Roe. They contend that on the death of Mary Robertson without issue, the share given to her for life passed by tacit substitution to Amelia Robertson and Mary Elizabeth Tunstall in equal shares.

It is certainly not unusual in the case of a gift to a class, the members of which are to take for life with remainder to their children, to find the benefit of survivorship attached to the gift in the event of one or more of the members of the class dying without issue. Often that is a very proper provision. It is one likely enough to commend itself to a person about to dispose of his property by will if it does not defeat or interfere with some object he has in view. But you cannot introduce it by mere conjecture. There must be either express declaration or necessary implication. Here there is neither the one nor the other. The case is very different from those cases on English wills to which Mr. Blake referred, where cross remainders must be implied in order to effectuate the testator's declared intention that the estate is to go over in its entirety. Here the appellant

desires that the share given to Mary Robertson should in the course of its devolution pass to the other two ladies in order that that portion of the estate may never reach its destination. There are two roads. One is blocked by the law which says that the journey must be completed in three stages if it is to be completed at all. Neither expressly nor yet by implication does the testator direct that road to be taken. The other fulfils all the conditions of the will. No doubt it involves a halt at one point of the journey. But that creates no difficulty. There is no intestacy. The law itself provides for the interval without suggesting that the provision is to count as a degree in the substitution. Article 963, which is admitted to be old law, declares that "if by reason of a pending condition or some other disposition of the will, the opening of the substitution do not take place immediately upon the death of the institute"—that is in the present case upon the death of Mary Robertson who became the institute in regard to the substitute who came next—"his heirs and legatees continue until the opening to exercise his rights and remain liable for his obligations."

In the course of the argument some faint reliance was placed on the word "conjointly" in the gift to the three ladies, as pointing to accretion. But the word "conjointly" is not inapplicable to a gift of property in equal shares so long as the property remains undivided. It may perhaps be inferred from the use of the word in the gift to the three and its absence in the gift to their children, that the testator desired to indicate that there was to be no partition before the property reached its final destination. However that may be, the word "conjointly" cannot neutralise or control the plain meaning of the words "in equal shares" by which it is immediately followed.

Their lordships therefore have no hesitation in expressing their concurrence in the judgment of the Court of Queen's Bench, which affirmed the decision of the majority of the Court of Review reversing the conclusion of the Superior Court.

Their lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The appellant will pay the costs of the appeal.

Appeal dismissed.

Hon. Edward Blake, Q.C., and *A. G. Cross* (both of the Canadian Bar) for the appellant.

Haldane, Q.C., and *Hon. C. A. Geoffrion, Q.C.*, and *E. Lafleur* (of the Canadian Bar) for the respondent.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, 3 August, 1897.

PRESENT :—LORD MACNAGHTEN, LORD MORRIS, SIR RICHARD COUCH, SIR HENRY STRONG.

CITY OF MONTREAL (respondent in Superior Court), appellant, and STANDARD LIGHT & POWER CO. (petitioner in Superior Court), respondent.

Statute, Interpretation of—55-56 Vict. (Q.) ch. 77—*Legislative powers—Interference with municipal control of streets.*

Held (affirming the judgment of the Court of Queen's Bench, Montreal, R.J. Q., 5 B.R. 558, 577, which affirmed the judgment of Tait, A.C.J., R. J. Q., 10 C. S. 209):—*Where the terms of a statute express the intention of the legislature with sufficient clearness the Court will not consider the reason of the law, nor interfere with its execution on the ground of the inconvenience and danger to the public which may result therefrom.*

The terms of the Act, 55-56 Vict. (Q.) ch. 77, as amended by 56 Vict., ch. 73, are sufficiently clear and positive to authorize the St. Henri Light & Power Company to lay wires underground in the streets of Montreal, and to open the streets for that purpose without first obtaining the consent of the municipal authorities, and such enactment was within the competence of the legislature.

The judgment appealed from was rendered by the Court of Queen's Bench sitting in appeal at Montreal, 3rd October, 1896, and affirmed the judgment of the Superior Court, Montreal, Tait, A.C.J., 21st September, 1896. The first judgment is reported in R.J.Q., 10 C.S. 209, and the judgment of the Queen's Bench in R.J.Q., 5 B.R. 558, 577.

LORD MACNAGHTEN :—

On the 10th of September, 1896, about half-past two o'clock in the afternoon, workmen in the employ of the respondent company or their contractors broke up the surface of St. Antoine Street in the City of Montreal, and began to excavate the soil for the purpose of laying underground wires along the street.

In the course of the same afternoon the city surveyor and the police officials, acting as was admitted under instructions from the municipal council of the city, interfered by force and compelled the men employed to abandon their operations.

On the following day, the 11th of September, the respondents filed their petition in the Superior Court praying for an injunc-

tion to restrain the city from interfering with their contractors and workmen.

After some interlocutory proceedings Mr. Justice Tait granted an injunction on the 21st of September subject to a temporary suspension of the order.

The city immediately appealed to the Court of Queen's Bench for Lower Canada.

The appeal came on to be heard on the 25th of September, and on the 3rd of October the Court delivered an unanimous judgment dismissing the appeal with costs. From that decision the present appeal has been brought.

Their lordships have before them the reasons of Tait, J., and the opinions of Sir Alex. Lacoste, C.J., and Wurtele, J., in which the other learned judges concurred. They agree entirely in the conclusion at which the provincial courts arrived and the reasons assigned for that conclusion.

The respondents were incorporated in 1892 under the name of The St. Henri Light and Power Company by the Act 55 & 56 Vict. ch. 77. It is only necessary to refer to four sections in this Act. Section 5 empowers the company to manufacture and deal in electricity, gas and other illuminants, and proceeds to declare that the company "may lay its wires.....underground "as the same may be necessary, and in so many streets, squares, "highways, lanes and public places as may be deemed necessary for the purposes of supplying electricity and gas for "light, power, and heating, the whole however without doing any "unnecessary damage and providing all proper facilities for free "passage through the said streets, squares, highways, lanes, and "public places while the works are in progress."

Section 6, which has been replaced by a more elaborate enactment, empowered the company to erect posts and supports for conducting their wires overhead.

Section 18, which is still in force, is in the following terms:—

"18. Before commencing the laying of wires or pipes or the "erection of waterways the company shall make a report to the "Commissioners of Agriculture and Public Works of the Province, of such works, and shall send a copy thereof to the council of the municipality in which such works are so projected."

Section 25, which is now repealed, declared that "the Company "may only exercise the privileges conferred upon it by the "present Act upon complying with the rules and regulations

" which exist or may be hereafter adopted by the municipal authorities on the subject."

The Act of 1892 was shortly afterwards amended by the Act 56 Vict., cap. 73, which received the Royal assent on the 27th of February 1893. By that Act the name of the company was changed to the Standard Light and Power Company.

Section 25 of the Act of 1892 was repealed altogether, and section 6 was replaced by an enactment which contains a proviso in the following terms :—

"The municipal council in all cities, towns or incorporated villages, if they deem necessary, shall have the right to oversee and prescribe the manner in which.....streets, roads and highways shall be opened.....for the placing of wires underground."

The combined effect of the two Acts therefore is that having made the report required by section 18 of the Act of 1892, and having sent a copy thereof to the council of the municipality in which the proposed works are projected, the company becomes entitled to lay its wires subject to the right of the municipal council if they deem it necessary to oversee and prescribe the manner in which the streets are to be opened for the placing of the wires underground, and subject of course to the general provisions enacted by the legislature for the convenience and safety of the public.

On the 15th of May, 1896, the company sent to the municipal council a notification referring to the right of supervision reserved to the municipality, and intimating that they intended to exercise the powers conferred upon them for laying underground wires for the purpose of conveying electricity through or along certain streets in the City of Montreal, including St. Antoine Street.

On the 22nd of August, 1896, the company duly made a report to the Commissioners of Agriculture and of Public Works of the works they proposed to commence in the City of Montreal, with a plan annexed, and on the 24th of August they sent a copy of the report and plan to the municipal council requiring them within ten days to prescribe the manner in which the streets mentioned in the report were to be opened, and stating that in case of default they would proceed with the works, taking all due precautions, and would lay their wires underground, according to the report, without doing any unnecessary damage and

providing all proper facilities for free passage while the works were in progress.

No notice whatever was taken of this communication, and so on the 10th of September the works were commenced, and then the proceedings took place which led to this litigation.

Their lordships are unable to find any justification in law for the action of the appellants. The language of the legislature is too plain to leave room for argument. The appellants indeed contend that it is hardly possible to conceive that the legislature could have meant to confer such extraordinary powers upon a mere trading company as to authorize them at their will and pleasure to interfere with public streets, the care of which is committed to the municipality, and they suggest that section 5 of the Act of 1892 may be construed as defining the objects of the company, and enabling them to lay down their wires provided they first obtain the consent of the city. It is true that the section does not in express terms authorize the company to open streets, but that power is plainly involved in the authority given to them to lay their wires underground, and it is impossible to read section 25 of the Act of 1892 without seeing that section 5 confers upon the company powers and privileges which but for section 25 they would have been at liberty to exercise without interference from any quarter.

Then it was argued that the company were bound to give the municipality reasonable time for considering their plans, and it was urged that a period of 10 days was much too short a notice for a great municipal body which must necessarily proceed in a somewhat leisurely fashion. Regular councils it was said were only held once a month, and although a special council could be summoned at two days' notice the respondents could hardly expect the municipal council of the city of Montreal to depart from their ordinary course for their convenience. There is however nothing to be found in the Act justifying the position taken up by the municipality, and considering that as early as May the company gave formal notice that they intended to exercise their powers, although certainly the notice was not one which the municipal council were bound to recognize, it is plain that provision might easily have been made for the emergency even if the council could not bring themselves to summon a special meeting for such an occasion.

When it is urged on behalf of the municipality that the legislature would not intentionally have put upon them the indignity

of subordinating their authority to the ends and purposes of a trading company, it may be replied that the legislature does not seem to have anticipated any friction or jealousy between two bodies which might be expected to work together for the benefit of the public. The amending Act which repeals section 25 in the Act of 1892 expressly authorizes municipal corporations to take shares in the company and aid the company by bonus, loans or advances, or by guaranteeing the payment of bonds, or by granting it such privileges and exemptions as the council of any such municipal corporation might deem advisable.

Their lordships are of opinion that the respondents acted within their powers in opening St. Antoine Street, that the municipality were not justified in obstructing their works, and that the injunction was properly granted.

Their lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed. The appellants will pay the costs of this appeal.

Appeal dismissed.

Sir Edward Clarke, Q.C., Ethier, Q.C. (of the Montreal Bar), and *J. R. Paget*, for the appellant.

Haldane, Q.C., and *R. C. Smith* (of the Canadian Bar) for the respondents.

HOUSE OF LORDS.

LONDON, 16 July, 1897.

EARL RUSSELL (appellant) v. COUNTESS RUSSELL (respondent).
32 L.J.

Judicial separation—Cruelty.

Persistence by a wife in a charge against her husband that he has committed an unnatural offence, which has been disproved to the satisfaction of a jury, and in which the wife herself does not believe, is not legal cruelty such as to entitle the husband to a decree for judicial separation.

Decision of the Court of Appeal, 64 Law J. Rep. P. D. & A. 105; L. R. (1895) P. 315, affirmed by the majority of the House (Lord Watson, Lord Herschell, Lord Macnaghten, Lord Shand, and Lord Davey); the Lord Chancellor (Lord Halsbury), Lord Hobhouse, the Lord Chancellor of Ireland (Lord Ashbourne), and Lord Morris dissenting.

HOUSE OF LORDS.

LONDON, 19 July, 1897.

BARRACLOUGH v. BROWN (32 L.J.)

Ship—Wreck—Abandonment by owners—Removal by navigation authority—Liability of shipowners for expenses.

Where a statute provides that a sum due or damages incurred shall be recovered in a Court of summary jurisdiction, it is not competent for the claimant to take proceedings for the recovery of the sum before any other tribunal than that provided by the Act, even for the purpose of ascertaining the right.

Section 47 of the Aire and Calder Navigation Act, 1889, provides that if any vessel shall be sunk within the limits of the undertakers' jurisdiction, the owner, in default of removal by him, shall be liable for the expenses of removal, and such expenses shall be recovered before a Court of summary jurisdiction.

Held, that the time when the expenses were incurred, and not the time when the vessel sank, was the period to determine ownership, and that the original owners, who had abandoned the vessel to the underwriters before the expenses were incurred, were not liable to the undertakers for the expenses incurred by the latter in removing the wreck.

Respondents' counsel were not heard.

Their Lordships (Lord Herschell, Lord Watson, Lord Shand and Lord Davey), after consideration, affirmed the decision of the Court of Appeal, 65 Law J. Rep. Q. B. 333.

THE VALUATION AND PAYMENT OF ANNUITIES.

Fifty years ago Vice-Chancellor Knight Bruce, in *Wroughton v. Colquhoun*, decided, in accordance with older authorities, that where a testator's effects are insufficient to satisfy an annuity as well as pecuniary legacies bequeathed by his will, the proper course of administration is to value the annuity and to pay the amount of the valuation at once to the annuitant, subject to an abatement in proportion to the abatement of the pecuniary legacies. The result of this is that, although the annuitant may die before the time when the payment of the annuity in full would have equalled the abated amount of the valuation, the other legatees will be unable to claim the surplus of that amount,

which has disappeared once for all into the pocket of the annuitant. The statement of the practice contained in "Seton on Judgments" is, "Where assets are deficient an annuity should be valued and abate proportionately, and the apportionment belongs to the annuitant absolutely." It would seem fairer to apply the amount of the valuation as long as it lasted in payment of the annuity in full, and to give the surplus, if any, to the other legatees; this would, at any rate, avoid the inconsistency of giving to the annuitant the capital value of the annuity, although he might die the next day. The same principle, however, applies in bankruptcy; though there is no doubt a distinction between the case of an annuitant who is in the position of a creditor and one who is a mere legatee. And it seems that the same course will be followed in the case of a determinable as in the case of an absolute annuity. Suppose, for instance, that the annuity is held subject to forfeiture on alienation, as happened in the case of *In re Sinclair*; the annuity fund will be payable to the annuitant, although on the valuation the contingency of forfeiture is disregarded, it being according to actuarial practice impossible to take it into calculation. There is an authority against this view as to annuities held subject to conditions in a case of *Carr v. Ingleby*, which is referred to in "Seton on Judgments," and which certainly seems more consistent with equity than the course adopted in *In re Sinclair*.—*Law Journal (London)*.

DIVORCE STATISTICS.

Nothing is so false as facts, except figures—thus the paradox; and judicial statistics are no exception—not less fallacious than other statistics. Take an instance. The latest volume of Judicial Statistics informs us that more divorce suits are commenced by husbands against their wives than by wives against their husbands. There were 353 suits in the year by husbands as against 220 by wives. "What!" says the unreflecting reader, "then it is the husbands who in most cases are the aggrieved parties; the wives who are the sinners." But the true inference is quite the other way. Wives do not seek divorce, not because they have not greater grievances than their husbands, but because they have more to lose, whether by a dissolution of the marriage or by a judicial separation, it matters not which. The break-up of the home is much more disastrous to the wife than

to the husband. Then there are the children to be considered. Personally the wife, even when innocent, suffers more in reputation from the censoriousness of society, unjustly, no doubt; but society is so constituted, and it is vain to protest. Moreover, the wife (such, again, are the ethics of society embodied in the law) has to prove unfaithfulness *plus* desertion or legal cruelty—to get over two stiles, in fact, where the husband has but one to surmount. A curious revelation of the statistics is that unfaithfulness breaks out mostly after between ten and twenty years of matrimony. The spouses presumably are tired of one another. Human life, as insurance companies know, has its critical periods, its dangerous ages, and the second decade seems to be the critical one of married life.—*Ib.*

A JOURNALIST'S SOURCES OF INFORMATION—ARE THEY PRIVILEGED?

The recent decision, says a writer in the *University Law Review*, of Judge Bradley in the action against Schriver, the newspaper correspondent of the "Mail and Express," who refused to answer a question propounded by the Senate investigating committee concerning the name of a Congressman who had informed him that he had been told by a certain wire manufacturer that there was, during the pendency of the Wilson Tariff bill in the Senate, a conference in a room in the Arlington Hotel between certain United States Senators and the sugar magnates, regarding which conference the witness had written a letter which appeared in the paper represented by him, opens up a somewhat new field for discussion. The witness's refusal was put upon the ground that a disclosure would be a breach of faith to his informant and a violation of his duty as a journalist. In this refusal he was sustained by the Court, which based its decision, however, upon the fact that the question asked of the witness was not pertinent to the subject under inquiry, and observed that:

"The reason given by the committee for its insistence upon an answer, and the reason urged on the argument of this motion in support of the right to put the question, was that, given the name of the member of Congress, he could be summoned and compelled to give the name of the wire manufacturer, and he, in turn, could be summoned and compelled to disclose what he had heard behind closed doors.

"This shows that the matter of giving the name of the Congressman might have been a matter of convenience to the committee, but it does not indicate that the name would be a material factor in proving or disproving the charges specified."

The principal point, as to the privilege of a journalist, has therefore been left untouched. The question is a novel one, and it is not unlikely that it may be raised at some future time by members of the press. The argument might, of course, be made that, as in the present instance, the majority of this kind of questions are put while in the pursuit of fishing expeditions and for the sole purpose of obtaining sources of evidence. Although when the matter arose in the *People v. Fitzgerald* (8 N. Y., Supp. 81), the New York Court declared an interrogatory somewhat similar in principle to be a proper one, in *Sterm v. The United States* (94 U.S., 76) it was held otherwise. Considering the matter purely as a question of privilege, it would seem exceedingly doubtful whether a court would be likely to extend the doctrine of privileged communications to a case like the present. A journalist stands on a very different plane from the advocate, the physician or the priest of a Church whose tenets prescribe confession. The immunity of the first has always been recognized both in the Roman and the common law, although one civilian thought that an advocate might lawfully be put to the torture and compelled to reveal the secrets of a client, but this doctrine appears to have met with strong disapprobation on the part of both the bench and bar. The doctrine as to the immunity of the physician and priest was a later outgrowth, and rests upon grounds too obvious to be discussed. But a very different state of facts is presented when we come to consider the case of a reporter or editor of a newspaper. While conceding the importance of the press as a factor in the unearthing of wrongdoing, it would seem to be exceedingly inexpedient to permit them to take shelter behind a question of privilege. Where newspaper articles have been published injurious to character, the party damnified should have a right to find out at whose instigation and upon whose authority they might happen to have been written. The doctrine of privileged communication should never be used to hide the machinations of some secret enemy, simply because he may choose to direct his attacks through the medium of the public press. It can hardly be said that a public official (this is cited merely as an illustration) against whom a

charge of malfeasance in office has wrongfully been brought, should be restricted to his remedy against the newspaper itself in a libel suit, and not be permitted to obtain the name of his true accuser.

On the whole, it seems better not to attempt to restrict the inquiry of a court any more than is absolutely necessary, and the present case scarcely seems to be one which is sufficient to warrant any extension of the doctrine of privileged communication.

GENERAL NOTES.

INSTRUCTIONS TO JURIES.—The Chicago Bar Association, through its president and secretary, recently took a postal-card ballot upon the question of "Oral Instruction to Juries." A postal-card was mailed to each member of the association requesting answers to the following questions: 1. Are you in favour of oral instruction to juries? (a) On the law alone? or, 2. If so: (b) On the law and the facts? Of the 550 cards mailed there were 290 replies; 181 voted in favour of oral instruction to juries, and 109 voted against oral instruction. Of the 181 who voted in favour of oral instruction 42 were in favour of instruction on the law alone, 119 were in favour of instruction on the law and the facts, and 20 qualified in various ways.

POLICE POWERS.—The evil ways of the police die hard. Again and again judges have pointed out that the police are not entitled to arrogate to themselves a right to question accused persons in private, which is not possessed by judge, jury, or counsel at any public hearing of the charge. At Warwick Assizes Mr. Justice Cave again expressed his well known views on the subject, and stated that he should certainly exclude all evidence obtained by this system of private interrogation, which is more appropriate to French than to English judicial procedure. He believes that most, if not all, of the judges agree with his opinion; and it is full time that the Home Secretary issued general instructions to the police throughout the country on this question, and on another of almost equal importance—the police practice of stripping and searching persons taken into custody irrespective of the nature of the charge or the improbability of any stolen property or weapon being concealed on the person of the accused.—*Law Journal (London)*.

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CURRENT TOPICS AND CASES.

Acting Chief Justice Tait, in his reply to the address of congratulation presented to him by the Montreal Bar, made some important observations on the administration of justice in this Province. It is obvious that since the present system of districts was introduced the vastly increased facilities of travel have removed most of the old objections to centralization. If such facilities had existed formerly the judicial districts might have been very differently arranged. There is at present a great waste of judicial force somewhere, there being thirty-six superior judges in this province, while all England, with a population of thirty millions, has only twenty-eight. Ireland comes nearer to Quebec in judicial numbers, there being seventeen superior judges to a population of about five millions. Of course it is not forgotten that our Superior Court judges also perform work which is done in England by a subordinate class. But after every deduction is made the discrepancy is marked. The suggestions put forward by the learned Acting Chief Justice deserve to be well weighed. He has frankly given the Bar and the public the benefit of his views on a subject of which he is peculiarly qualified to judge. If the suggestions do not bear fruit in desirable amendments to our judicial system the responsibility will not rest with him.

Lord Justice Lopes having been raised to the peerage with the title of Lord Ludlow, the name long familiar to the legal profession will not continue to appear in the reports of the Court of Appeal. Probably, however, the elevation of the Lord Justice to the peerage will be followed soon by his retirement from the bench. The new lord takes the title of Ludlow because it was his mother's name.

An ingenious expedient has been resorted to in some places to obviate the objection of unsanitary bibles in Court rooms. Although the ceremony of kissing the book has a certain solemnity, and may add to the sanctity of the oath in certain minds, the material of the cover can have nothing to do with the binding nature of the oath. Accordingly bibles have been bound in celluloid covers, which may be washed and kept clean, and these are offered for use in police courts and other places where oaths are administered.

Examinations tend to become more stringent everywhere. It can hardly be supposed that students are more careless or indolent than formerly; yet take the result of recent examinations in England. For admission to study, 218 candidates; passed, 174. Final examination, 120 candidates; passed, 77.

NEW PUBLICATIONS.

THE CANADIAN ANNUAL DIGEST, 1896. By Charles H. Masters, Reporter of the Supreme Court of Canada, and Charles Morse, LL.B., Reporter of the Exchequer Court of Canada—Toronto: Canada Law Journal Company, Publishers.

This is a work which has been much needed for some time, and the profession throughout the Dominion and elsewhere will welcome it with gladness. Few members of the Bar are able to add to their libraries all the volumes of reports which are issued. If they obtain those of their own province and of the Supreme

Court, with the principal English or French reports, they are usually satisfied. But they would like to keep themselves informed of what is being decided in the other provinces, as otherwise they may sometimes advise their clients incorrectly, and possibly go on fighting a case for a year or more in ignorance that a decision of an appellate court on the same point, and under a law common to all the provinces, has been rendered on one side or the other. The present Digest will make it an easy matter to turn at once to the recent decisions on any point throughout all Canada. That the bulk of the reports is not inconsiderable is evident from the fact that 371 double column pages are occupied by the digest of subjects, and the table of cases reported extends over 16 pages in small type.

The reports digested are Supreme Court of Canada, Vols. 25, 26; Exchequer Court of Canada, Vol. 5, Nos. 1-3; Ontario Appeal Reports, Vol. 23, Nos. 1-4; Ontario Reports, Vol. 27; Ontario Practice Reports, Vol. 17, Nos. 1-5; Quebec Reports, Queen's Bench, Vol. 5; Superior Court, Vol. 9; Nova Scotia Reports, Vol. 28, Nos. 1, 2; New Brunswick Reports, Vol. 33, No. 4; New Brunswick Equity Reports, Vol. 1, Nos. 2, 3; Manitoba Reports, Vol. 11, Nos. 1-4; British Columbia Reports, Vol. 3, No. 2; Vol. 4. Also a digest of the Canadian cases decided by the Judicial Committee of the Privy Council during the year, with tables of the cases digested, cases affirmed, reversed, or specially considered, and of the statutes referred to.

We have said enough to indicate the utility of the work. It seems to have been compiled with much care, and is neatly printed. Henceforward it will be indispensable in the lawyer's office, and we hope that the compilers will receive sufficient encouragement to make its annual appearance a certainty.

THE DOMINION CONVEYANCER. Second edition, by Wm. Howard Hunter, B. A., barrister-at-law.—Toronto: The Carswell Company, Publishers.

This is a volume of 576 pages, being the second edition, revised and enlarged, of Mr. Hunter's compilation of forms for general use and clauses for special cases. The editor expresses his belief that no standard form has been overlooked. Immediately following the typical precedents under each title have been added clauses adapted to special or unusual cases. An analytical index to all the forms facilitates reference and extends the application of the precedents.

EXCHEQUER COURT OF CANADA.

11 Oct. 1897.

Before BUBBIDGE, J.

THE DOMINION ATLANTIC RAILWAY COMPANY, claimant; and
HER MAJESTY THE QUEEN, defendant.

Practice — Submission to arbitration — Award — Rule of Court — Judgment.

The Exchequer Court has no jurisdiction to entertain an application to make an award under a submission to arbitration by consent in a matter *ex foro* a judgment of the Court.

C. J. R. Bethune for motion to make award judgment of Court.

F. H. Gisborne, contra.

 QUEBEC ADMIRALTY DISTRICT.

3 August, 1897.

Before ROUTHIER, L. J.

THE BELL TELEPHONE COMPANY OF CANADA, Limited, plaintiffs,
and THE BRIGANTINE "RAPID," HER CARGO
AND FREIGHT.

Trespass — Interference with submarine cable — Notice — Damages.

By a regulation passed by the Quebec Harbour Commissioners in 1895 and subsequently approved by the Governor in Council and duly published, the Commissioners prohibited vessels from casting anchor within a certain defined space of the waters of the harbour. Sometime after this regulation had been made and published the commissioners entered into a contract with the plaintiffs whereby the latter were empowered to lay their telephone cable along the bed of that part of the harbour which vessels had been so prohibited from casting anchor in. No marks or signs had been placed in the harbour to indicate the space in question. The defendant vessel, in ignorance of the fact that the cable was there, entered upon the space in question and cast anchor. Her anchor caught in the cable and in the efforts to disengage it the cable was broken.

Held, that she was liable in damages therefor.

Caron, Pentland & Stuart, for the plaintiffs.

Miller & Dorion, for the ship.

11 Oct. 1897.

Before BURBIDGE, J.

THE QUEEN on the Information of the Attorney General for the
Dominion of Canada, v. WILLIAM JOSEPH POUPORE,
JOHN GEORGE POUPORE and JOHN BURNS
FRASER.

Contract—Public Work—Negligence—Sufficiency of proof.

In an action by the Crown for damages arising out of an accident alleged to be due to the negligence of a contractor in the performance of his contract for the construction of a public work, before the contractor can be held liable the evidence must show beyond reasonable doubt that the accident was the result of his negligence and must exclude all presumptions as to its having arisen in any other way.

E. L. Newcombe, solicitor for plaintiff.

Christie, Greene & Greene, solicitors for the defendants.

RECENT UNITED STATES DECISIONS.

Certificate of deposit.—A certificate of deposit reciting that it is "to be left six months," and adding, "No interest after maturity," is held, in *Towle v. Starz* (Minn.) 36 L. R. A. 463, to be a time, and not a demand, certificate, and that to hold an indorser payment must be demanded at the end of six months on the last day of grace.

Insurance.—A bicycle association which agrees to clean a member's bicycle twice each year, repair tires when punctured by accident, and the bicycle if damaged by accident, also to replace it if stolen unless recovered in eight months, and provide another bicycle during that time, in consideration of which the member pays \$6 membership fee per year, is held, in *Com., Hensel v. Provident Bicycle Asso.* (Pa.) 36 L. R. A. 589, not to constitute an insurance company for which a charter is necessary under the Pennsylvania statutes.

Promissory note obtained by fraud.—An illiterate maker induced by fraud to sign a note and mortgage, supposing he is signing other instruments, is held, in *Green v. Wilkie* (Iowa) 36 L. R. A. 434, not to be liable even when the note is in the hands of an innocent purchaser, unless he was guilty of negligence in making

the note. This is on the ground that he was never a party to the contract contained in the instrument. With this case the authorities are collected showing the general rule, and the exceptions thereto, as to the effect of fraud in obtaining the execution of a note as against a *bona fide* holder.

Promissory note.—Failure of the apparent maker to repudiate his forged signature to a note when it is first shown him, and even his statement that the note will be paid, are held, in *Traders' Nat. Bank v. Rogers* (Mass.) 36 L. R. A. 539, to be insufficient to render him liable unless the holder had been induced thereby to assume and act upon the assumption that the signature was genuine or was admitted to be so. The note to the case reviews the decisions on the liability of persons whose signatures are forged on commercial paper, including the questions of estoppel and ratification of such signatures.

Carrier.—The misdelivery of goods by an agent of a connecting line or a warehouseman is held, in *Illinois Cent. R. Co. v. Carter* (Ill.) 36 L. R. A. 527, insufficient to render the forwarding carrier liable, where it safely delivered the goods to the connecting line, for a safe carriage to the destination.

The fact that a train was running at high speed in violation of law and in breach of the promise of the engineer made to a boy who intended to jump off is held, in *Howell v. Illinois Cent. R. Co.* (Miss.) 36 L. R. A. 545, insufficient to render the railroad company liable for injury to the boy, when he attempted to get off knowing the danger.

The fact that a person is blind is held, in *Zachery v. Mobile & O. R. Co.* (Miss.) 36 L. R. A. 546, insufficient to justify a carrier in refusing to accept him as a passenger.

Covenant as to building.—A building erected in place of one which has been destroyed on premises subject to a covenant against erecting any building thereon except one of which the design is approved by certain directors of an association is held in *Peabody Heights Co. v. Wilson* (Md.) 36 L. R. A. 393, to be subject to such covenant only so far as to prevent erecting a structure inferior to the original one, or which is calculated to depreciate the value of the adjacent property, but that the new building need not necessarily be of the same plan as the original one, or approved in all its details by the directors.

Murder.—Voluntary intoxication is held, in *Harris v. United States* (D. C. App.) 36 L. R. A. 465, to be neither an excuse nor

a palliation for the crime of murder. In a note to this case a great number of authorities are compiled on the question, "What intoxication will excuse crime?"

Breach of contract—Damages.—The sickness and death of children, which are directly due to the failure of a natural-gas company to supply the needed gas for fuel to a dwelling house in winter, when it had assumed to furnish the supply and other fuel could not be procured, are held, in *Coy v. Indianapolis Gas Co.* (Ind.) 36 L. R. A. 535, to be elements of damages recoverable from the gas company.

Municipal law.—An ordinance limiting the speed of driving on streets to 6 miles an hour is held, *State v. Sheppard* (Minn.) 36 L. R. A. 305, to be inapplicable to a salvage corps responding to an alarm of fire, and as to them it is held that the restriction is unreasonable and invalid. A note to the case shows the other decisions on the regulation of speed of vehicles in streets.

Power to license and exact a reasonable fee for the use of streets and alleys by vehicles is held, in *Tomlinson v. Indianapolis* (Ind.) 36 L. R. A. 413, to be within the general power to regulate the use of streets. And the fact that some revenue arises from the licenses is held insufficient to condemn them.

Lease.—The destruction of a substantial portion of leased premises without the lessee's fault is held, in *Wattles v. South Omaha Ice & C. Co.* (Neb.) 36 L. R. A. 424, to release the lessee from liability for rent *pro tanto*, unless he expressly assumed the risk of the destruction. This repudiates the common law rule, and approves an opinion of Judge Brewer in a Kansas case, "because it is a magnificent protest against slavish devotion to antiquated rules and . . . because it breathes the spirit of humanity and equity, and is based on a thought of the nineteenth century."

The liability of a municipality for damage to premises by surface water resulting from changing the grade of a street is held, in *Jordan v. Benwood* (W. Va.) 36 L. R. A. 519, to be limited to cases in which the water is collected and cast upon the lot in a body or mass; and the mere fact that the surface water is interfered with or its flow increased by a change of grade is insufficient to make the city liable.

For the loss of the fingers of a little child who puts her hand up the spout of a coffee grinder in a store or shop, while there

with her father to make a purchase, it is held, in *Holdbrook v. Aldrich* (Mass.) 36 L. R. A. 493, that the shopkeeper is not liable.

The power of a city council to order the destruction of all intoxicating liquors in the city, and pledge the faith of the city to pay for them in anticipation of riot, lawlessness, and mob, as on the evacuation of Richmond, in April, 1865, is denied, in *Wallace v. Richmond* (Va.) 36 L. R. A. 554, overruling the prior decision in that state which had been followed by the Supreme Court of the United States in another case growing out of similar facts.

Negligence in pointing a gun at another and pulling the trigger is held, in *Bahel v. Manning* (Mich.) 36 L. R. A. 523, to be unaffected by the fact that the person doing it had used the ordinary means of unloading the gun and satisfied himself that it was unloaded. But the fact that the person injured failed to protest or get out of the way when he saw that the gun was about to be snapped, and had time to do so, was held to constitute such contributory negligence as would preclude his recovery of damages from the other.

An aged woman riding in a funeral procession in a carriage driven by her daughter-in-law, when it was struck by a street car at a crossing, is held, in *Johnson v. St. Paul City R. Co.* (Minn.) 36 L. R. A. 586, to be not chargeable with negligence, although she did not look or listen for approaching cars, but relied entirely upon the driver.

For fire communicated from a cooking car owned by an independent contractor engaged in cutting wood for a railroad company, it is held, in *Leavitt v. Bangor & A. R. Co.* (Me.) 36 L. R. A. 382, that the railroad company is not liable, although it had placed the car on a spur track for the use of the contractor.

A conveyance to a railroad company, releasing all damages sustained or which shall be sustained by reason of the "construction, building, or use" of the railroad, is held, in *Fremont, E. & M. V. R. Co. v. Harlin* (Neb.) 36 L. R. A. 417, insufficient to preclude the grantor from recovering damages for the negligent maintenance and operation of the road; but the release is treated as equivalent in this respect to a judgment of condemnation.

The assumption by the engineer of a train that a person on the track will get off before the train reaches him is held, in

Gunn v. Ohio River R. Co. (W. Va.) 36 L. R. A. 575, to be improper when the person on the track is a child of tender years, or one who is plainly and obviously disabled by deafness, intoxication, sleep, or other cause.

The fact that a woman injured in a railway car was stunned, and after recovering consciousness was still dazed and nervous when a release of damages presented to her in a hospital was signed by her without reading, is held, in *Och v. Missouri, K. & T. R. Co.* (Mo.) 36 L. R. A. 442, insufficient to avoid the release, although it was obtained by misrepresenting to her its contents.

ADDRESS TO SIR MELBOURNE M. TAIT.

At the re-opening of the law courts, at Montreal, on the 10th September, the Bar of the City of Montreal presented an address of congratulation to Sir Melbourne Tait, Acting Chief Justice of the Superior Court, upon his receiving the honour of knighthood from Her Majesty the Queen. The honour was conferred on Jubilee Day, but as the Courts were then on the eve of closing for the vacation it was deemed advisable to defer the presentation of the address.

In both numbers and enthusiasm the occasion was a memorable one. Over three hundred members of the Bar were present. On the bench with the Acting Chief Justice were Justices Mathieu, Taschereau, Loranger, Pelletier, Davidson, de Lorimier, Ouimet, Tellier and Curran.

Among the members of the Bar, were: Messrs. C. B. Carter, Q. C., *bâtonnier*; L. J. Ethier, Q. C., treasurer; L. E. Bernard, secretary; G. Lamothe, Q. C.; P. B. Mignault, Q. C.; Harry Abbott, Q. C.; F. J. Bisailon, Q. C.; F. X. Choquet, Q. C.; Thos. and R. Dandurand, councillors. Hon. A. R. Angers, Q. C.; L. J. Archambault, Q. C.; L. H. Archambault, Q. C.; T. P. Butler, Q. C.; F. de Salle Bastien, Q. C.; J. P. Cooke, Q. C.; P. J. Coyle, Q. C.; G. B. Cramp, Q. C.; L. H. Davidson, Q. C.; E. Lef. de Bellefeuille, Q. C.; John Dunlop, Q. C.; Hon. C. A. Geoffrion, Q. C.; A. W. Grenier, Q. C.; J. S. Hall, Q. C.; J. C. Hatton, Q. C.; H. J. Kavanagh, Q. C.; Jas. Kirby, Q. C.; P. E. Lafontaine, Q. C.; F. S. Lyman, Q. C.; D. Macmaster, Q. C.; R. D. McGibbon, Q. C.; John L. Morris, Q. C.; Hon. L. O. Taillon, Q. C.; N. W. Trenholme, Q. C.; Jas. B. Allan, C. H. Archer, J. G. H. Bergeron, M. P.; A. J. Brown, Chas. Bruchesi, C. S.

Burroughs, J. T. Cardinal, F. J. Curran, A. Chauvin, M.P. ; J. G. D'Amour, Peers Davidson, A. E. De Lorimier, R. G. De Lorimier, Ph. Demers, J. A. Drouin, L. P. Dupré, Geo. P. England, Alex. Falconer, Thos. Fortin, M. P. ; Aimé Geoffrion, Hon. F. E. Gilman, L. G. Glass, Eug. Godin, M. Goldstein, Ed. Guerin, F. A. Hogle, M. Hutchinson, V. F. Jasmin, Eug. Lafleur, D. A. Lafortune, J. A. Lamarche, P. Lanctot, Hosmer Lanctot, C. Lane, M. G. Larochelle, Louis Loranger, F. S. Maclellan, Archibald McGoun, L. T. Marechal, F. H. Markey, Fred. Meredith, D. Monet, M. P. ; D. R. Murphy, J. Adelard Ouimet, G. F. O'Halloran, T. Pagnuelo, E. Pelissier, Camille Piché, A. Plante, G. H. Plourde, N. T. Rielle, C. Rodier, P. C. Ryan, L. W. Sicotte, jr. ; E. Surveyer, Horace St. Louis, W. S. Walker, R. S. Weir, W. J. White, Wilfrid Mercier, and many others.

Lady Tait, on her arrival, was received by the *Bâtonnier* and escorted to a seat of honor, where she was presented with a magnificent bouquet. A number of other ladies were present, including Mesdames O'Halloran, Rowand, Hampson, Grant, the Misses Curran, and others.

Sheriff Thibaudeau was in attendance, in his robes of office, as well as Hon. Arthur Turcotte, Prothonotary, and Messrs. Gareau, Lozeau, and Vallée, three deputy prothonotaries. As soon as the judges were seated Mr. Carter, with all the barristers present, rose, and the *Bâtonnier* read the following address:—

Your Honors :

A very pleasing duty devolves upon me to-day at the opening of this Court after the long vacation, it is the presentation of an address of congratulation by the Bar of Montreal to Sir Melbourne Tait, acting Chief Justice of this Court, upon his creation as a Knight by Her Majesty.

I am sure I voice the sentiments, not alone of members of the Bar, but of all who have had to come before the Superior Court, in saying that the judges who have had to preside over our courts during the past few years have had more than their share of work to do.

During the alterations which were made to this Court House, the arrears of cases became something appalling, it seemed an almost hopeless task to overcome them, but thanks to the great administrative ability of our worthy acting Chief Justice, together with the magnificent co-operation given to him by Your Honors, the Superior Court of this district may now be said to

be free of arrears, so that litigants have no cause of complaint of tardy justice. I am sure Your Honors are justly entitled to the greatest praise and the best thanks of the Bar and public for the work you have accomplished.

I should like to refer to the remuneration of the Judges, but I fear this is not the place or the occasion to do so. I will only say that the Bar is almost a unit in saying that your remuneration is altogether inadequate, out of proportion to the labor performed, and I trust that members of the Bar who occupy seats in the Parliament of Canada will not fail in their duty in seeing that justice be done in the matter and a great wrong be righted.

The address of the Bar of Montreal, which I have the pleasure to present I will with your Honors' permission now read.

To the Honorable Sir Melbourne MacTaggart Tait, D. C. L., Knight, etc., etc., Acting Chief Justice of the Superior Court for the District of Montreal:

The Bar of Montreal learned with great pleasure of the honor which Her Most Gracious Majesty conferred upon you in June last, upon the occasion of the celebration of the sixtieth anniversary of her illustrious reign, by elevating you to the dignity of Knighthood, and they take the first opportunity, upon this formal opening of the Courts of the Province to-day, of asking you to accept of their hearty congratulations upon the event.

Your brilliant attainments at the Bar, your devotion to work since your elevation to the Bench, your love of justice, your wide-spread knowledge and your high character as a Judge—combined with all the virtues of a good citizen, designated you as worthy of the Royal favor which you have received.

We are sure that the Bar of Montreal echoes not alone the sentiments of your brother Judges, but of the whole Bar and people of our Province in wishing you in the future, even greater success than in the past, and we pray that you may be long spared to enjoy the honors which you have so justly won.

We ask you to convey to Lady Tait our respectful compliments, and the expression of our sincere wishes for her happiness.

On behalf of the Bar of Montreal.—

C. B. Carter, Bâtonnier.
Arthur Globensky, Syndic.
L. J. Ethier, Treasurer.
L. E. Bernard, Secretary.

Montreal, 10th September, 1897.

Sir Melbourne Tait made the following reply :—

Mr. Bâtonnier and Members of the Bar of Montreal :—

Gentlemen,—I thank you most sincerely for your kind address, expressing your hearty congratulations upon my elevation to the dignity of knighthood, and your appreciation (so much more favorable than I feel I deserve), of my legal attainments and character. It is hard to find words in which properly to express to you how deeply sensible I am of the great honor Her Majesty has been graciously pleased to bestow upon me as the representative of the Superior Court Bench in this part of the province. It is a distinction in which all the members of that Bench as well as of the Bar have a share, for it is a gracious recognition on the part of our Sovereign of the important part which the administration of justice plays in the welfare and happiness of Her subjects, and a striking reminder to those who, as Her representatives, are called upon to discharge that duty, of the tremendous responsibility which rests upon them to see that it is purely and promptly administered.

When I recall the great attainments of my distinguished predecessors who have been similarly honored, I realize how far I fall short of possessing their qualifications for filling the important position I occupy, but at the same time I claim the privilege of saying that I am quite as anxious as any one could be to do the best I can. The fact that you, who have known my career, and who see my work from day to day should consider me in any way worthy to receive this Royal favor, is a source of unbounded satisfaction and encouragement to me. My lines have indeed fallen in pleasant places, for since my appointment as Acting Chief Justice, my able and experienced colleagues (several of whom are my seniors on the Bench), have treated me with the greatest consideration, have given me many valuable suggestions, and have most heartily assisted in every effort to dispose of the heavy list of cases in arrear, and it is to their co-operation and arduous labor that is due the success we have attained in that respect under the new system of hearing cases. I should be ungrateful indeed, if I did not avail myself of the present opportunity of expressing my gratitude to them for their unfailing kindness.

To you, the members of the bar, my warmest acknowledgments are due for your uniform courtesy and for many words of

encouragement culminating in the kind address which you have just presented.

You will perhaps allow me to say a few words regarding the administration of justice in this district. It will be generally admitted that to be effective it should be prompt. Of course this does not mean that there must always be a judge ready to try a case, for that is not always possible, but it does mean that it must be so kept up that cases may be heard within a reasonable time after they are inscribed.

You are all aware also that the business before our Superior Court has enormously increased owing no doubt to the great growth of the city and its wonderful expansion as a commercial, railway and shipping centre. I have not verified the fact, but it has been authoritatively stated that more than half of the legal business of the province is done here. Without going into detail on this point, I might refer for instance to the great amount of work thrown upon the Court of Review by being created a court of final resort in city expropriations and municipal cases, and by the change in the law granting an appeal direct from that Court to the Supreme Court of Canada, and to Her Majesty in Her Privy Council. In fact it is only necessary to glance over our legislation of late years to see that the intervention of the Court or of a judge is now required in a great many more cases than formerly. It has also to be remembered that in this province in ninety-nine civil cases out of a hundred, the judge has to decide the facts as well as the law.

Apart from this district there are ten others in what may be called the "Montreal Review Division," presided over by nine judges, one of whom is authorized to reside in Montreal. I believe that with the exception of the district of St. Francis, the judicial work of these districts does not nearly occupy the time of the resident judge, and in view of the great increase of it in Montreal it appears to me that the time has fully arrived for a re-adjustment of judicial labor so that it may be fairly and equally distributed.

While it is right and proper that justice, civil and criminal, should be administered in each district, I do not know of any paramount reason why a judge should be required to reside in any of these districts, with the exception of St. Francis and perhaps of Ottawa. In the former the work is too heavy for one judge, who has seven Circuit Courts to attend besides the one at

the chef-lieu; in the latter the judge has under his charge the district of Pontiac. In every other district a judge can leave Montreal in the morning and reach the chef-lieu in time to open the Superior Court. We have judges who render us assistance who leave their districts in the morning and return to their homes the same afternoon. I think that all of them except those serving in the two districts which I have named, might with great benefit to the administration of justice reside in Montreal and the work be done from the city under the direction of the Chief Justice. Nothing but good could result from the close association and conference between the judges such a state of things would bring about, and amongst other benefits uniformity of practice would be established, deliberation in review cases would be facilitated, and above all we would have the constant assistance of these judges in the work here where it is much required, and the result would be a much fairer distribution of labor. Moreover, I believe that such a change instead of retarding the work in the country districts would give it a fresh impetus. I should be glad indeed if, as an experiment, a few, at any rate, of these outside judges who live nearest to Montreal could be brought here to reside, and the work of their districts be attended to in the way I have suggested.

It is true that there are some thirty Circuit Courts apart from those at the chefs-lieu. I think, however, that it would be quite possible to have these satisfactorily attended to by the Superior Court judges from Montreal if necessary, but I am strongly of opinion that they should be relieved from sitting in the Circuit Court in the country parts as they have been relieved from doing in this city. In all other provinces except Manitoba, the judges of the superior Courts are not called upon to administer justice in the inferior Courts. As the law now stands, the Circuit Court at the chef-lieu of each district has only jurisdiction in cases under one hundred dollars, while in the counties it has jurisdiction up to two hundred dollars. The proportion of cases between one hundred and two hundred dollars cannot be very large, and I think that no injustice could result from reducing the jurisdiction of the county Courts to cases under \$100, and increasing the jurisdiction of the district magistrates so as to enable them to take all the work of the Circuit Court. If it is not desirable to alter the jurisdiction of the court, then the jurisdiction of the district magistrates might be enlarged so as to cover all cases therein subject to the review that now exists.

I believe that the adoption of these suggestions would improve the administration of justice in this section of the province.

Under whatever system we may work, we shall always require your hearty co-operation, and having had your valuable assistance in the past, we feel we may confidently rely upon it in the future.

Gentlemen, again let me thank you from the bottom of my heart for the kind words which you have spoken to me to-day; they will never be effaced from my memory.

It will not be necessary for me to convey to Lady Tait your kind message, for she is present, and has listened to the address with, I am sure, as much pride and pleasure as I have. On her behalf I beg also to thank you for the kind wishes you have expressed for her happiness.

The *Bâtonnier* then presented to their Honours several newly admitted members of the Bar, who were appropriately welcomed by Sir Melbourne, and the proceedings came to an end.

GENERAL NOTES.

MORAL AND INTELLECTUAL INJURY.—Sir Theodore Martin, writing to the *Times* on the Transvaal indemnity, says: The claim of Mr. Kruger to be indemnified for "moral and intellectual injury" reminds me of the item in the professional account of an Edinburgh W.S., which came under my notice in the days of my legal apprenticeship in that city. At the end of a well-charged bill of costs against his client was added an item, not a small one, "To great personal anxiety and fatigue in the management of your affairs."

Gen. Butler was riding to town in a Cambridge car. He was busily engaged in reading a book of legal appearance, when James Russell Lowell entered the car. "Ah, general," was his greeting: "are you reading law?" "No," was the reply; "only Supreme Court decisions."

A WEALTHY JUDGE.—The late Lord Justice Kay left personal estate of the value of £203,404.

JUDGES AND THE PRESS.—The Master of the Rolls has always expressed a strong contempt for newspaper criticism. The best answer to any idea that a judge cared about a newspaper article was, he told a Mansion House audience some years ago, an anecdote he recollected of a rather cynical brother of theirs who, when he was told that he had been praised in a newspaper

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said, "Good heavens, my dear fellow, did I make a fool of myself?" Judges, if they thought of it, could not be popular; they did their duty. The man whom they sentenced to be hanged would not like them very much; neither would the man whom they sentenced to penal servitude for life.—*Law Journal*.
VACATION WORK.—To the story of the vacation judge who, dashed into the sea by a persistent barrister, granted an injunction for a bathing costume, is added the story of a judge who was dashed in the hunting field by a solicitor in urgent need of an answer.

On arriving at the country house at which the vacation judge was spending his leisure days the solicitor heard that his horse had started off with the hounds. Nothing daunted, he mounted the fastest horse in the village, and, after a run of forty furlongs, came up with the hunt. It took him ten minutes, however, to reach the judge, who was showing a clean shaven face to all the laymen. "In the name of the law, m'lud," exclaimed the attorney, as he caught the bridle of the judge's horse. The scarlet-clad judge instantly drew rein, scanned the affidavits placed in his hand, wrote the injunction order with a fountain pen, threw the documents back to the solicitor, put spurs to his mare, and rode away to the music of the hounds.—*Ib.*

LEGAL DISPENSARY.—Some French lawyers are trying the experiment of giving legal advice free at the Palais de Justice, on the same principle as medicine is dealt out at dispensaries. This is a revival of the Bureau of Charitable Jurisprudence, founded by the Constituent Assembly in 1790, and it has been in operation for nearly two years. There are several departments, each managed by a lawyer of ten years' standing, with two or three men as his assistants. The office is open one morning and one afternoon a week. Last year, from January to December, 104 persons applied for advice; 1600 of them merely wanted answers to some legal question; 17 were lunatics, and 37 well to do people were seeking assistance under false pretences. The lawyers took up, however, 166 delicate and complicated cases, and succeeded in settling 61 of them to the satisfaction of their clients; the other 105 were lost after a trial.

INTERVIEWER DEFEATED.—Sir Frank Lockwood, Q. C., in the course of his last American trip, was asked, "Are you for silver?" Sir Frank was little disposed to commit himself to a discussion of American politics, and airily replied, "Why, I am for both, of course, and for just as much of either as it is possible to obtain."

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CURRENT TOPICS.

The September appeal list at Montreal exhibited a considerable increase of business, the roll containing sixty cases—a number which has not been reached for several terms past. The long interval which had elapsed since the May term accounts for the principal part of this increase. The Bar got to work with much alacrity, and seldom has better progress been made with the arguments. On one day, besides motions, five appeals were fully heard on the merits, being an average of less than sixty minutes to each case. In all, 31 cases were heard, and a large number of judgments rendered, the court rising on the 24th September.

The first annual banquet of the Bar of Montreal was certainly attended with a most gratifying success, and the result must have been extremely pleasing to the *bâtonnier* and others, who kindly gave much time and exerted themselves to make the arrangements as perfect as possible. The judges, by their attendance at the opening dinner, contributed largely to the *éclat* of the occasion. The absence of Sir Melbourne Tait, who was suffering at the time from indisposition, was generally regretted. From the success which attended the first meeting, it is natural to expect that succeeding celebrations will be

even more interesting and noteworthy. We give elsewhere a short account of the event, derived in substance from reports in the daily press. The *résumé* is somewhat meagre as regards the speeches, but it serves to indicate the purport of what was said.

At the date of writing, rumors have been in circulation that the Chief Justice of the Supreme Court is about to retire from that position, and that he will restrict himself in future to his duties as a member of the Judicial Committee. It is usually safe to disregard rumors of judges' resignations, but if this particular one prove true it will not occasion much surprise. The position of Chief Justice of the Supreme Court of Canada is obviously incompatible with that of a member of the Judicial Committee of the Privy Council, the Canadian appeals to the Judicial Committee—the most important of them at all events—being usually from the Supreme Court. Moreover, there is an obvious difficulty—not inconsiderable in any case and still more serious to a person of advanced years—in sitting in two courts three thousand miles apart. This difficulty may be diminished if the roller ship of the future enables the traveller to cross the Atlantic between dawn and dusk on a single day, but pending some such triumph of science, the duties of the judge in England cannot but interfere with his work in Canada, and even if this were not so, there seems to be no occasion for such duplication of offices.

EXCHEQUER COURT.

26 April, 1897.

Before BURBIDGE, J.

GEORGE B. BRADLEY, claimant; and HER MAJESTY THE QUEEN,
defendant.

Civil servant—Extra work—Hansard reporter—The Civil Service Act, Sec. 51—Application.

The provisions of sec. 51 of *The Civil Service Act*, preventing the payment of any extra salary or additional remuneration to

any Deputy Head, officer, or employee in the Civil Service of Canada, or to any other person permanently employed in the public service, do not apply to a reporter on the Debates' staff of the House of Commons. (Affirmed on appeal to Supreme Court, 19th October, 1897.)

W. D. Hogg, Q.C., for claimant.

E. L. Newcombe, Q.C., (D.M.J.) for defendant.

COURT OF APPEAL.

LONDON, 14 May, 1897.

Before LINDLEY, L.J., LOPES, L.J., RIGBY, L.J.

OGILVIE v. LITTLEBOY. (32 L.J.)

Setting aside voluntary deed—Burden of proof—Mistake—Intention not carried out.

The object of this action was to set aside two voluntary deeds which had been executed by the plaintiff, Mrs. Ogilvie, with the object of founding two charities in London and Suffolk.

She did not ask for rectification, but desired to have the deeds entirely set aside, on the ground that they did not carry out her intentions, inasmuch as they did not reserve to her absolute control of the capital and income during her life, nor protect her from liability to account, especially to the Charity Commissioners, nor give her a power of sale free from the interference of the Charity Commissioners; and, further, that she had not been informed of a difficulty which might arise in the appointment of new trustees through the possible refusal of the Society of Friends to take part in such appointment.

Byrne, J., dismissed the action with costs, and the plaintiff appealed.

Their Lordships dismissed the appeal with costs. They said that voluntary deeds of gift could not be set aside simply because the donors wished that they had not made them and would like to have back the property given. Where there was no fraud, no undue influence, no fiduciary relation between donor and donee, no mistake induced by those who derived any benefit by it, a gift, whether by mere delivery or by deed, was binding on the donor. Where all those elements were absent, there was no general principle of equity that the burden was on the donee to

prove that the donor knew what he was doing and was under no mistake. In the absence of such circumstances of suspicion the donor could only get back the property by showing that he had acted under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property. The evidence showed that the plaintiff thoroughly understood and approved of everything that had been done, and her advisers had acted honestly and to the best of their judgment in her interest. The deeds could not be set aside on the ground that it had been found impossible to avoid the jurisdiction of the Charity Commissioners, nor on any of the other grounds, either singly or combined.

COURT OF APPEAL.

LONDON, 16 July, 1897.

Before LORD ESHER, M.R., SMITH, L.J., CHITTY, I.J.

THAMES CONSERVATORS *v.* SMED ET AL. (32 L.J.)

Thames—Foreshore—Rights of owner of shore—Right to take sand—‘Bed’ of Thames.

Appeal from the judgment of Bruce, J., at the trial of a point of law raised in the action.

The action was brought for a declaration that a place called Hadleigh Ray, situated in Essex, on the north side of the Thames within the plaintiffs' district, was part of the bed of the Thames within the meaning of section 87 of the Thames Conservancy Act, 1894, and for an injunction to restrain the defendants from dredging and raising gravel and ballast and other substances therefrom without the licence of the plaintiffs. It was admitted that the defendants raised sand at the place in question between high and low water marks at ordinary tides; that the place was private property; and that the defendants raised the sand under a licence from the owner of the place, but without the licence of the plaintiffs. The question of law was whether the place from which the defendants had raised the sand was part of the "bed of the Thames" within the meaning of section 87 of the Thames Conservancy Act, 1894.

Bruce, J., held, on the authority of *Pearce v. Bunting*, 65 Law J. Rep. M.C. 131; L.R. (1896) 2 Q.B. 360, that the place from which the sand was raised being between high and low water

marks was not a part of the "bed" of the Thames within the meaning of section 87, and gave judgment for the defendants.

The plaintiffs appealed.

Their Lordships, after taking time to consider, held, disapproving *Pearce v. Bunting, supra*, that the expression "bed of the Thames" in section 87 of the Thames Conservancy Act, 1894, includes foreshore, although it belongs to private owners, which is situated between high and low water marks of the river at ordinary tides, and allowed the appeal.

SOME OLD LAW BOOKS.

Law books are certainly among the things that have kept pace with the population. It is especially true of legal treatises that of the making of them there is no end, and there is scarcely a lawyer who would not add that much study of them is a weariness of the flesh. Although law books were amongst the earliest works that issued from the printing press in England—the statutes of Henry VII. were printed by Caxton himself—yet Coke, writing some 250 years ago, could not count more than fifteen treatises on the law. Now the libraries in the inns are scarcely less spacious than the dining halls, and the text-books, to say nothing of the reports and statutes, are to be numbered by their thousands. Copies of all the ancient works mentioned by Sir Edward Coke may be found in the libraries of the inns, and, though most formidable in appearance, some of them possess an interest for the general reader as well as the legal student. To Ranulf de Glanville, who was chief justice in the reign of Henry II., belongs the distinction of writing the first treatise on the law. He combined with the learning of the lawyer the valor of the soldier, and he is known to fame not only as the father of legal literature in England, but also as the captor of the King of Scots at the battle of Alnwick. Among the most precious volumes in Lincoln's Inn Library is a M.S. copy of his treatise more than 500 years old. A peculiarity of Britton's work, which is believed to have been written under the direction of Edward I., is that the words are put into the mouth of the king. This treatise was written in French, in which language law books continued to be written for nearly four centuries. During the same reign the commentary on English law called "*Fleta*" was written. Nothing is known of the author except that he commenced and completed the work while he was confined in the

Fleet Prison, a fact which explains its curious title. Littleton, who bears among Coke's fifteen authors the most familiar name, was a judge of Common Pleas in the time of Edward IV. His celebrated work, the first edition of which was printed in 1481, is devoted to an explanation of the law as to the tenure of land. Its fame has, of course, been largely preserved by the remarkable commentary of Coke, which, according to the enthusiastic and eloquent Fuller, will be admired "by judicious posterity, while Fame has a trumpet left her and any breath to blow therein."

A modern legal writer, who arranged his work in the form of a dialogue, would be regarded as frivolous. Yet this was the form in which two of the old jurists cast their work. Fortescue, who wrote his treatise in the reign of Henry VI., while in exile in France with the Prince of Wales and other members of the Lancastrian party, represented himself as conversing with the young prince on the laws of England, and proving their superiority to those of other lands. "Doctor and Student," which was written early in the sixteenth century by Christopher Saint Germain, of the Inner Temple, is a series of dialogues between "A Doctor of Divinity and a Student in the Laws of England, concerning the Grounds of those Laws." Perhaps the most interesting fact about this quaint production is that it was cited as an authority by the judges at the trial of Hampden. On a fly-leaf of the Lincoln's Inn copy of Fitzherbert's "Grand Abridgment of the Law" is the following curious inscription: "Of your charity pray for the soul of Robert Crawley, sometimes donor of this book, which is now worm's meat, as another day shall you be that now are full lustye, that remember, good Christian brother. Farewell in the Lord. 1534." The first edition was printed in 1516, and this is the date in the copy in Lincoln's Inn Library, which is singularly rich in ancient volumes. It would appear that the producers of law books in Fitzherbert's days were gifted with a greater love for art than is possessed by the authors of modern law books. Some of their title pages were adorned by the most elaborate designs. The first part of "Fitzherbert" contains a wood cut of the king on his throne, whilst the second is ornamented by a wonderful collection of the royal arms, a dragon and a greyhound, two angels, some scrolls, and a rose. It would be difficult for an illustrated law book to command the serious attention of lawyers in these days, even though its artistic embellishments came from Sir Frank Lockwood.

After speaking of such writers as Bracton and Littleton, one hesitates to describe Blackstone's Commentaries as an old law book. It was first published at Oxford 137 years ago. But legislation moves so fast that, to glance at an early edition of the famous work, is to believe that it is older than it actually is. No law book has ever enjoyed so great a measure of popularity. As many as twenty-one editions were published before any alteration was made in Blackstone's text, and innumerable attempts have since been made to adapt it to the ever-changing law. How far these endeavors have been successful may be judged from the fact that the value of the Commentaries is now solely historical. As was once said, "The cannonade which has been playing on the Commentaries, exposing, as they do, so wide a front, has rendered them, as they were left by their author, a mere wreck." Not a little of their popularity was due to the impressive style in which they were written. Never in a law book has lucidity been wedded so happily to felicity. It is clear, notwithstanding the complaints he addressed to his fellow-tenant in Brick-court, that Blackstone's literary powers were unaffected by the boisterous sounds in Goldsmith's rooms overhead. The basis of the Commentaries was a series of lectures which Blackstone delivered at Oxford, and this may partly account for their sonorous note. Like most of the eminent legal writers of the old school, Sir William Blackstone was a judge. Here, again, a change may be observed. The bench is no longer recruited from the ranks of text-writers. Judges whose stepping-stones to fame were books are still to be found in the courts. Lord Justice Lindley, for instance, owes his judicial seat largely to his standard work on partnership. But there is now a strong tendency to exclude text-book writers from the active practice of the law, to make them a separate class of superior persons whose refined minds ought not to be devoted to anything less noble than the theory of the law. Among the first six leaders of the bar, there is not one with any reputation as an author.

During the past thirty years the publication of leading cases has been under the control of a council representative of both branches of the profession. The Law Reports have not, however, caused such old-established reports as the Law Journal Reports to disappear. The earliest reports in the libraries of the inns were issued in the reign of Edward II. Until the time of Henry VIII. the business of reporting was in the hands of lawyers, who were paid by the crown. Their reports, which were published

annually, are known as "Year Books." These are among the most quaint and valuable volumes in the libraries. To modern eyes, it is true, neither their bulk nor price is imposing. At the end of the Tenth Book of Edward IV's reign, which consists of forty pages, are these words: "The price of thys boke is iiiid. unbounde." The ordinary reader, who looked for entertainment in these time-worn pages would suffer some disappointment, but it is said that Sergeant Maynard had "such a relish of the Year Books that he carried one in his coach to divert his time in travel, and chose it before any comedy." After the crown ceased to supply the courts with reporters, the business of preserving the important decisions of judges was undertaken by a succession of eminent lawyers, among the number being Coke and Plowden. Law reporters grew so numerous after the Restoration that a diminution in their number was regarded as imperative, and an act was passed prohibiting the publication of law books without the license of the judges. The rapid increase of reporters had, however, no peculiar relation to the restoration of the Stuarts, for Bulstrode, the foremost reporter during the Commonwealth, alluded to the multiplicity of reports in these picturesque terms: "Of late we have found so many wandering and masterless reports, like the soldiers of Cadmus, daily rising up and jostling each other, that our learned judges have been forced to provide against their multiplicity by disallowing of some posthumous reports, well considering that, as laws are the anchors of the republic, so the reports are as anchors of laws, and, therefore, ought to be well weighed before being put out.—*London Globe*.

ANNUAL DINNER OF THE BAR OF MONTREAL.

The first annual dinner of the Bar of Montreal took place at the Windsor Hotel on the evening of 23rd September, and was pronounced a gratifying success. Over 150 persons sat down at the tables, including nearly all the members of the Bench of this district. Sir Melbourne Tait was unfortunately prevented by illness from being present.

The banquet hall was handsomely decorated with flags on all four walls. The menu was an excellent one, and the list of dishes was embellished with amusing and appropriate selections from Shakespeare and other works.

Mr. C. B. Carter, Q.C., the *bâtonnier* of the Bar of Montreal, presided, and on his right were Sir Alexander Lacoste, Mr. F. X.

Lemieux, Q.C., *bâtonnier général*, Mr. Justice Wurtele, Mr. Justice Pagnuelo and Mr. Justice Archibald, while on his left were his Worship Mayor Wilson-Smith, Ald. Prefontaine, Mr. Justice Curran, Hon. L. O. Taillon, Mr. Justice Doherty and Mr. Justice Purcell. There was no attempt, however, to group the speakers at any one table, and Mr. Justice Davidson, who responded to the toast of the Bench, Hon. J. E. Robidoux, who replied for the Bar, and Mr. Donald Macmaster, Q.C., who also responded to the toast of the Bar, all occupied seats at different tables.

Those present at the dinner, besides the names already mentioned, were: Judges L. A. Jetté, L. O. Loranger and A. Ouimet, Recorder de Montigny and Magistrate Sicotte, Hon. Horace Archambeault, C. A. Geoffrion, J. E. Robidoux, P. E. LeBlanc, Th. Chase Casgrain, Gedeon Ouimet, A. W. Atwater, Donald Macmaster, Gustave Lamothe, R. D. McGibbon, H. C. St. Pierre, H. J. Kavanagh, S. Beaudin, E. L. de Bellefeuille, J. Alexandre Bonin, L. Henri Archambeault, J. J. Beauchamp, F. X. Choquet, P. B. Mignault, L. J. Ethier, James Crankshaw, Arthur Globensky, James Kirby, G. B. Cramp, N. W. Trenholme, E. N. St. Jean, W. J. White, L. P. Berard, Philippe Demers, J. U. Emard, L. J. Marechal, Jos. A. Descarries, Wilbrod Pagnuelo, L. G. A. Cressé, L. E. Bernard, Chas. Raynes, M. J. Morrison, C. A. de L. Harwood, J. E. Martin, G. P. England, A. Rives Hall, Peers Davidson, William Donahue, S. Carmichael, L. G. Glass, Victor E. Mitchell, S. W. Jacobs, J. W. Blair, R. C. Smith, Elzear Roy, A. Falconer, N. T. Rielle, Chas. A. Duclos, J. F. Mackie, R. A. E. Greenshields, Geo. F. O'Halloran, A. E. Beckett, Percy C. Ryan, J. T. Cardinal, Albert E. de Lorimier, J. M. Ferguson, P. J. Coyle, E. J. Duggan, W. Henry Burroughs, A. E. Harvey, H. J. Cloran, G. A. Morrison, J. A. Robillard, J. H. Mignerion, G. E. Mathieu, Romuald Delfausse, C. I. de Lanaudiere, J. P. Whelan, J. Wilson Cooke, Edouard Fabre Surveyer, Aimé Geoffrion, J. P. Landry, J. A. Drouin, Chas. Archer, C. A. Chenevert, A. W. P. Buchanan, A. T. Hogle, Alphonse Decary, Jeremie L. Decarie, J. A. Labelle, A. Marsan, W. E. Mount, Ls. J. Loranger, Paul St. Germain, Maxwell Goldstein, Horace A. Hutchins, J. P. Cooke, Robert Stanley Weir, W. Simpson Walker, D. A. Lafortune, A. Dorion, A. Bergevin, M. Hutchinson, D. R. McCord, N. Driscoll, Lomer Gouin, Wilfrid Mercier, R. Dandurand, Rodolphe Lemieux, F. A. Genereux, F. X. Roy, Victor Geoffrion, L. Jos. Lajoie, A. E. Poirier, Paul Lacoste, Jos. A. Lamarche, C. B.

Beaubien, R. G. de Lorimier, Oscar Lavallée, Eug. Lafontaine, Robert Taschereau, J. L. Perron, Chas. A. Wilson, J. S. Buchan, Gonzalve Desaulniers, Paul G. Martineau, E. L. Desaulniers, Honoré Gervais, L. A. Rivet, C. H. Stephens, Oscar Gaudet, Emile Joseph, Tancrede Pagnuelo, Pierre Beullac, J. A. C. Madore, Jas. B. Allan, Eugene Lafleur, F. E. Marshall, Fred. H. Markey, D. C. Robertson, R. Stanley Bagg, Donat Brodeur, Eug. H. Godin, Seth P. Leet, Ernest Pellissier, Campbell Lane, Arsene Lavallée, C. Theoret, T. P. Butler.

The chairman, Mr. C. B. Carter, in proposing the first toast, "The Queen," spoke of the reforms which had been instituted during the reign of Her Majesty, and from which the Bar had greatly benefited.

The toast was then drank standing, the whole gathering joining in singing "God Save the Queen."

After Mr. Brodeur had next favored the assemblage with a song, the toast of "The Bench" was proposed by the chairman, who said:—"The toast which I am about to propose is one which should be received and drank by us all with every honor, for it refers to an honorable body with which we are brought in daily contact: I refer to the Bench of this province. In the fulfilment of their duties our judges have had many obstacles to contend with, their paths have not always been pleasant, our system of law and procedure may not be perfect—('hear, hear')—but in the administration of justice our judges are impartial and conscientious, and, like Shakespeare, we may point to them and say, 'There sits a judge that no king can corrupt.' During the past few years great reforms have been introduced into our law; the exigencies of trade and commerce have demanded speedy justice. Amendments without number to the Code of Procedure were introduced, giving rise to an immense amount of litigation, until finally a new Code of Procedure was formulated, which came into operation on the first of this month.

"With this problem our judges have to grapple, and we ask them to interpret the code liberally, in the interest of the public as well as of the Bar, so that in the future there will be no cause for complaint against judges and lawyers of unnecessary delay. (Hear, hear).

"There have been, and are to-day, on the bench men whom any country might be proud of, and who have done much to make Canada what she is, the brightest jewel in the dominions of the

great Empire to which we belong. I said a moment ago that the judges' paths were not always pleasant. The remark applies to Montreal in particular. Members of the Bar need look back but a few months to the congested state of the rolls of the Court of Appeal and the Superior Court. See the splendid results of the work done by the Montreal judges, with the co-operation of their brethren from the other districts, for to-day there are practically no arrears in these courts. I say the judges are entitled to the praise and thanks of all. I only trust that the question of their salaries will soon be dealt with in a substantial and just way, befitting the high position which they occupy. (Applause). There are many things I would like to speak of concerning the bench, but I shall not take up more of your time, as we have promised to be brief in our addresses. I have much pleasure in proposing the toast of 'The Bench.'

Chief Justice Sir Alexander Lacoste, replying to the toast of the Bench, thanked the chairman for the kind expression of confidence in the Bench to which he, on behalf of the Bar of Montreal, had given expression. It would, he continued, perhaps seem indelicate were he to refer to the matter of the salaries of the judges, which the chairman had mentioned. But he was not present as a judge, but as one of the Bar, and he could say that it was in the interest of the good administration of justice that the salaries of the judges should be adequate to the responsibilities of their position and the work they had to perform. Speaking of the status of the law in the Province of Quebec, the Chief Justice said that there were in the Province of Quebec a sufficient number of judges, but it was desirable that there should be a more equitable distribution of the work. The speaker then related a little incident of his early experience as a lawyer. He was practicing in a small town in Quebec, and one day there was a new crier to open the court. The crier was seemingly quite proud of the temporary dignity with which he had been invested, and gathering his robe about him and swelling out his chest he opened the court thus: "Voyez, voyez, voyez! Serrez vos pipes, La cour va commencer; Vive la Reine!"

Mr. Justice Davidson, in the absence of Acting Chief Justice Tait, also responded. For the first time in the history of the province, he said, judges and lawyers had gathered together to express the mutual friendship and respect which they felt for each other. That was a fact of paramount importance. Reference

had been made to the introduction of a new code of procedure. He was not without some anxiety as to its future success. The work was one which was surrounded with difficulties. The code of procedure of France was now some 100 years old and during that time it had undergone only three changes. During our existence as a Dominion of some 30 years, however, our code had undergone some 400 changes. He thought he might safely say, however, that the code of procedure of the Province of Quebec was the most simple and the most effective in the Dominion. There was, however, the grievance that here lawyers were bounded by the limits of their particular judicial districts. He had always regretted that in this province there was not a larger system of circuits. Lawyers were bounded by the narrow confines of their own judicial district, whereas throughout Ontario and the other provinces of the Dominion, rising advocates came face to face with audiences throughout the length and breadth of the province. That was also the case in regard to the judges. By this means the people throughout the province not only heard but were brought face to face with those qualities of integrity, of judicial honor, and of professional acumen which must give them an added idea of the dignity of the profession. If the Bench had failed in the performance of its duties, it had, at least, striven to do honest justice. Might it never be said that it was not eager to do even justice between people of unequal fortunes, and to make all in this province understand that they must be obedient to the law, and that they were not beyond its reach.

Mr. Justice Curran, as the youngest member of the Bench, proposed the toast of the Bar. The profession of law, he said, was one of the oldest and most honorable in the universe. Lawyers had at all times played a leading role in the history of the world, and in the history of no country had they played a more prominent part than in that of our own Dominion. What, for instance, would the history of Canada be if the names of Macdonald, of Cartier, of Mowat, of Dorion, of Thompson, of Laurier, and of innumerable others, were stricken out? A short time ago, he continued, there were in Montreal the most eminent men of the medical profession from all parts of the Empire, and the one great idea sought to be impressed upon the minds of the profession was that in the future it should be sought to require a university education on the part of those who were aspiring to become members of the profession. The legal profession had

sought to elevate the standard, and to have all obtain their degrees in arts before commencing the study of law. All had been done that men could do to give the profession in this province a high standing. That was being achieved day by day, and it was hoped that success would crown the efforts being put forth in that direction.

Before the toast was responded to the chairman read the following letter from Sir Melbourne Tait:

Mr. Bâtonnier,—I regret extremely that following the advice of my doctor I am obliged to forego the pleasure of attending the dinner to-night. In thought and spirit I shall be with you and drink most heartily the toast of the Bar of Montreal, for they are jolly good fellows as I have good reason to know. Wishing you a pleasant evening, and hoping to be on hand at the next dinner,

Believe me,

Yours faithfully,

M. M. TAIT.

The Hon. J. E. Robidoux responded to the toast of the Bar. He spoke of the erroneous impression which many persons held with regard to the members of the legal profession. The latter were often represented as prowling about seeking to rob and despoil the widows and the orphans, while, as a matter of fact how often it was that the lawyer's heart had been touched by a piteous appeal, and he had contributed his services freely and fully without expectation of any material reward.

Mr. D. Macmaster also responded. He spoke of the honorable traditions of the Bar, and quoted from the Lord Chancellor of England, to the effect that the first duty of the profession was to maintain its honorable traditions. The first duty of an advocate was to serve his client; but there was a duty higher than that, and it was that of honor. "The advocate should always fight with the sword of the soldier, never with the dagger of the assassin." He spoke of the courtesy, consideration and kindness with which the Bench received the members of the Bar, and said that everything should be done to cement the good feeling that now existed between them.

"Our Guests" was responded to by His Worship the Mayor. After thanking the Bench and Bar for their kindness, His Worship said that before he left the mayoral chair, he wanted to see two things take place. He wanted to see a revised charter, and

steps were being taken in that direction. He also wanted to see the harbor improvements commenced and carried out with some prospect of their being commensurate with the port of Montreal. He would not be sorry, when his term of office had expired, to hand over the responsibilities and cares of the mayoralty to his successor. He was somewhat like the American who came here and had his first experience of tobogganing, and who said that he would not have missed it for \$1000, but he would not repeat it for \$10,000.

Mr. F. X. Lemieux, *bâtonnier général*, also responded, and in concluding proposed the *Bâtonnier* of the Bar of the District of Montreal, to which Mr. Carter appropriately and briefly responded. It was past midnight when the banquet was over.

GENERAL NOTES.

CRIME IN FRANCE.—Since 1881 the number of criminal cases in France has, says the *Revue des Deux Mondes*, increased by 30,000, although practically the population has not increased at all. Especially has the number of murders and homicides increased. Up to recent times Italy reported the largest percentage of criminals of this kind—namely, from 250 to 300 each year. France has now the sad distinction of being in the lead, the average in late years being about 700. While Italy reported annually about 80 child murderers, France now averages 180. Taking all the data together, the criminality of France has just about doubled in the last fifty years. The saddest feature about this increase is the fact that it is proportionally greatest among the youth of the country. The actual fact is that the number of criminals who are yet children or youths is twice as large as the number of adult criminals, although France has only about seven million children and youths, and twenty million adults. In Paris more than one-half of the criminals arrested are less than twenty-one years of age. Prostitution among children is alarmingly on the increase. During the last ten years an average of 4,000 of such cases were brought to the attention of the authorities every year. In 1830 there were but five suicides to every 100,000 inhabitants; in 1892 there were 24, and the rate is increasing. Suicides of children under sixteen were formerly unknown in France; now there are on an average 55 each year. And in 1875 there were 375 suicides between sixteen and twenty one.

CITING LAW TO A VETERAN.—Lord Esher, master of the rolls, still active at 82 years of age, has, it is said, been giving some unconventional *dicta* from the bench. In an action for libel involving the professional sensibilities of two musicians, one of whom was Tito Mattie, the composer, the judge stopped a counsel who wished to quote authorities as to what may be libel, saying "If you do, it will be a serious libel on us. We ought to know enough law to decide a wretched case of this size, where the damages were only £20, without counsel having to help us by referring to authorities. Do shut up your book."

THE QUAKER AND HIS HAT.—During the hearing of a case before Mr. Justice Grantham at Leeds, one of the witnesses for the plaintiff, an old man named James Briggs, stepped into the witness-box wearing an old-fashioned broad-brimmed Quaker hat, and ignored a whispered intimation from the judge's clerk that he must remove it. His Lordship asked him if it was part of his creed to keep his hat on, and under what circumstances he wished to keep it on. The witness replied that he believed it to be required of him to keep it on in the presence of all men, but that he thought it right to take it off when using the name of the Almighty. He added that, although he did not wish to act with any want of respect to the Court, he did not feel called upon to uncover. The learned judge said he should be sorry to say anything to hurt anyone's conscience, and that he would not ask the witness to remove his hat, and the old man accordingly was allowed to make an affirmation with his hat on.

The following headnotes, says the American *Case and Comment*, appear in Kulp's report of a recent Pennsylvania case: '1. When a cow, city-bred and country-sold, dissenting from its changed environment, and disregarding the right of its purchaser, returns to the city and conducts herself upon the highway in a manner prejudicial to little children, and repugnant to municipal ordinances, a constable who recognises her as an old acquaintance, and extends the friendly shelter of his barn, being assisted therein by a policeman, is not guilty of obstructing the latter in the performance of duty by subsequent refusal to surrender possession, without evidence upon the record showing special authority in the policeman from the mayor under the ordinance involved, because, in the absence thereof, neither officer had exclusive right, and hence the constable being *prior in tempore*, was *potior in jure*. 2. *Semble*, a case which involves, upon *certiorari*, the

judicial relation of a cow to a constable, and of both to a policeman, demands more elaborate consideration than Courts usually bestow upon litigation originating before justices of the peace.'

"An Old Bailey Sessions Paper of Two Hundred Years Ago" is the title of an article in the *Westminster Review*, and the extracts given by Mr. Vellacott, who contributes the article, show that the offences tried differ but little from those with which modern judges are accustomed to deal. He says: "If we compare these sessions papers with any of our own time, we shall notice points of both likeness and unlikeness—likeness, because human nature is very much the same in all ages, and there is in legal phraseology a rugged conservatism; unlikeness, because criminal law and criminal procedure have altered with the embracing fabric of civilization. Some offences are now obsolete; other new ones have sprung up. If the clippers of coin are no longer hanged and burned, the counterfeiter and the utterer are sent to hard labour and penal servitude. The murder of a husband is no longer petty treason, benefit of the clergy is gone, and the infamous branding which was its outcome. No more is the convict transported to the American plantations or the West Indian sugar islands. The receiving of stolen goods is more dangerous than in times of yore. The acquisition of money by false pretences, if thoroughly established, receives a more specific, if not more effective, punishment than the pillory."

Sir William Leece Drinkwater, first deemster of the Isle of Man, who this month has completed fifty years' service as judge of the Manx High Court, will at the end of the month send in his resignation of the office of deemster. Sir William, who is eighty-five years old, has seen longer judicial service than any judge in the United Kingdom. Since his appointment he has been *ex officio* a member of the Legislative Council or upper branch of the Manx Legislature. He is a native of Liverpool, but is Manx by descent.

The trial, in England, of a man named William Lennox Watson, for manslaughter, in causing the death of a lady, whom he assumed to treat for cancer, has resulted in the acquittal of the prisoner—greatly to the dissatisfaction of the medical profession. His treatment consisted in the application of a plaster containing arsenic. The patient died of arsenical poisoning. The defence was that she kept the plaster on longer than he directed, and that his services were wholly gratuitous.

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CURRENT TOPICS AND CASES.

In *The Queen v. St. Louis*, on the 14th instant, Mr. Justice Wurttele, sitting on the Crown Side of the Court of Queen's Bench, decided some novel and interesting questions. An information was laid by Mr. Sherwood, Commissioner of the Dominion Police, before one of the judges of sessions, charging one St. Louis with having received various sums of money from Her Majesty the Queen by false pretences. In the information Sherwood took the quality of Commissioner of the Dominion Police, and added to this designation the words "and acting as such on behalf of Her Majesty the Queen." The magistrate found the evidence insufficient and discharged the accused. Thereupon, at the instance of Sherwood, an indictment was preferred against St. Louis in the Queen's Bench, Crown Side, under the provisions of Art. 595 of the Criminal Code. The Grand Jury threw out the bill. The first question was whether Mr. Sherwood was personally liable for the costs of the accused. The Court held that as Commissioner of the Dominion Police he had no legal capacity to act for and represent the Queen, and therefore he merely acted as a private individual in binding himself to prefer an indictment. The Attorney General of Canada, it was declared, in the absence of any express provision of law, is alone authorized to represent the Queen in all matters which concern the government of Canada. It followed that Mr. Sherwood must

be personally condemned to pay the costs. The next question was whether he could be condemned to pay the costs and disbursements of the accused as between attorney and client. This point the Court ruled in favor of the Commissioner, holding that he was only liable for such costs as in a civil suit would be taxable against the losing party. The last point was as to the basis on which the taxation should be made, there being no tariff applicable to criminal cases. It was decided by Mr. Justice Wurtele that in the absence of a tariff the costs must be taxed in the discretion of the judge.

Mr. Justice Curran has been presiding in the Court of Queen's Bench at Sherbrooke. The calendar was heavy and many of the prisoners were tried for serious offences. The *Waterloo Advertiser* says the learned judge "won golden opinions from the bar and the public for the able manner in which he conducted the business of the Court."

The *Green Bag*, for October, contains a portrait of Acting Chief Justice Sir Melbourne M. Tait, with a biographical notice from the pen of Mr. R. D. McGibbon, Q.C. The reproduction of the photograph does not seem to be as successful as some pictures which have appeared in the *Green Bag*, of other Canadian judges. It can hardly be said to do justice to the subject. The biographical notice is reproduced in our present issue.

The retirement of Lord Esher, Master of the Rolls, is to lawyers one of the most interesting and notable events of the year. Lord Esher's judicial career extends over one half of the Victorian reign, and few indeed of those now on the Bench or prominent at the bar were known to fame when he took his seat for the first time. The *London Law Journal*, referring to the report of Lord Esher's retirement, said:—"The profession has long taken a pride in the enduring qualities of Lord Esher's mental and physical powers, and it will hope, despite his eighty-two years, that he may long enjoy the leisure he has earned

so well. During the thirty years he has occupied a seat on the Bench he has been distinguished by a real knowledge of the law, a wide acquaintance with the world, a striking independence of judgment, and a great dislike of mere technicalities and shams." The same journal, noticing the statement (since confirmed) that Lord Justice Lindley was to be Master of the Rolls, observed:—"His claim to the position lies in the distinguished service he has rendered in the Court of Appeal, where he has occupied a seat for sixteen years. Since the retirement of Lord Justice Cotton in 1890, Lord Justice Lindley has presided over the second section of the Court, and the manner in which he has discharged this duty is ample evidence of his fitness for the higher post. Few occupants of the Bench have brought to the performance of judicial duties so large a combination of admirable qualities. With him a deep knowledge of legal principles is allied to a firm and ready grasp of facts."

SUPREME COURT OF CANADA.

OTTAWA, 12 Oct. 1897.

Quebec.]

DUBOCHER v. DUROCHER.

Judgment—Petition to set aside—Requête civile—Jurisdiction.

Judgment on the appeal of *Durocher v. Durocher* was pronounced by the Supreme Court of Canada on May 1st, 1897, dismissing the appeal with costs. In the following October term the appellant presented a *requête civile*, asking that the judgment be set aside and the proceedings opened up, on the ground that since the judgment a deed had been discovered which had been fraudulently concealed by the respondent and the judgment dismissing the appeal was therefore obtained by fraud.

Held, that the Court had no jurisdiction to grant the application; that it has power to annul errors in its own judgments, but not to interfere in a case of this kind.

Petition refused with costs,

Belcourt, for the petition.

Geoffrion, Q.C., contra.

19 Oct., 1897.

Exchequer Court.]

BRADLEY v. THE QUEEN.

Crown—Action against by civil servant—Official reporters—Extra salary or remuneration—R. S. C., c. 17.

By sec. 51 of the Civil Service Act (R. S. C., c. 17), no "extra salary or remuneration" can be paid to a member of the civil service unless the sum thereof has been placed in the estimates and authorized by vote of Parliament or Order-in-Council. In an action by an official stenographer of the House of Commons to recover the price of services performed for the Crown, outside the scope of his official services,

Held, affirming the judgment of the Exchequer Court, but for different reasons, that he was entitled to recover; that the Civil Service Act applies to the official stenographers; and that the words "extra salary or remuneration" in the Act refer only to the salary or remuneration paid to a member of the civil service for performance of his official duties, but do not prohibit payment for other services.

Appeal dismissed with costs.

Newcombe, Q.C., D.M.J., for the appellant.

Hogg, Q.C., for the respondent.

22 Oct., 1897.

Ontario.]

THE CITY OF TORONTO v. THE TORONTO RAILWAY CO.

Appeal—Assessment cases—Court for—Persons presiding—Appointment of—52 V., c. 37, s. 2 (D.)—55 V., c. 48; 58 V., c. 47 (O.)

By the Supreme Court Amendment Act of 1889 (52 V., c. 37, s. 2), an appeal lies to the court from the judgment of any court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority.

By 55 Vic., c. 48 (O.), an appeal lies in a matter of assessment from the Court of Revision to the County Court judge, and by 58 Vic., c. 47 (O.), two County Court judges from adjoining counties may be associated with the judge of the district in which the property assessed lies, for the hearing of such appeal.

On appeal to the Supreme Court from the decision of the County Court judges under the said legislation of Ontario,

Held, King, J., dissenting, that the persons presiding over the court appealed from were appointed by federal authority, and the case was not within the amendment of 1889. The Court, therefore, had no jurisdiction to hear the appeal.

Appeal quashed with costs.

Laidlaw, Q.C., for the appellant.

Robinson, Q.C., for the respondent.

Ontario.]

29 Oct., 1897.

O'DONOHUE v. BOURNE.

Appeal—Judgment by default—Application to be let in to defend—Discretion—R. S. C., c. 135, s. 27—Final judgment.

In an action in the High Court of Justice of Ontario by B. against O., judgment was entered for want of a plea. O. applied to a Master in Chambers to have the judgment set aside, and to be allowed to file his appearance and defend the action. This application was refused by the Master, and his refusal was affirmed on appeal to a Judge in Chambers, and on further appeals to the Divisional Court and Court of Appeal. From the decision of the Court of Appeal, O. sought to appeal to the Supreme Court of Canada. On motion to quash his appeal,

Held, that it was discretionary with the Master to grant or refuse the application to open up the proceedings in the action, and under sec. 27 of the Supreme and Exchequer Courts Act (R. S. C., c. 135), no appeal could be taken to the Supreme Court from the decision on such application.

Quære: Was the judgment appealed from a "final judgment" within the meaning of sec. 24 (a) of the Act?

Appeal quashed with costs.

Latchford, for the motion.

O'Donohue, in person, *contra*.

British Columbia.]

22 Oct., 1897.

THE UNION COLLIERY CO. v. THE ATTORNEY-GENERAL OF
BRITISH COLUMBIA.

Appeal—Reference to provincial court for opinion—54 V., c. 5 (B.C.)

By the Act of the British Columbia Legislature, 54 Vic., c. 5, the Lieutenant-Governor-in-Council may refer to the Supreme

Court of the Province, or to a Divisional Court thereof, or to the full court, any matter which he thinks fit so to refer, the opinion of the court to be deemed a judgment of the court, and an appeal to lie therefrom as in the case of a judgment in an action.

Held, that no appeal lies to the Supreme Court of Canada from the opinion of the British Columbia Court on such a reference. If it was the intention of the Act to create such an appeal, it was beyond the powers of the legislature of the province.

Appeal quashed without costs.

Robinson, Q.C., for the motion.

Hogg, Q.C., *contra*.

RECENT UNITED STATES DECISIONS.

Abortion.

Voluntary submission to treatment for the purpose of an abortion is held, in *Goldnamer v. O'Brien* (Ky.) 36 L.R.A. 715, to preclude any right of action against other persons for inducing and aiding the attempt. This is based on the general rule that the suit of a wrongdoer will be rejected when seeking redress for another's participation in the wrong.

Bank.

A cashier's check drawn by a banker upon himself "to the order of" another person is held, in *Henry v. Allen* (N.Y.) 36 L.R.A. 658, to constitute a negotiable instrument giving the rights of a bona fide holder to one who received it from an agent by mail in return for checks and drafts mailed to the agent for deposit.

Payments to a depositor during a run on a bank and after the cashier has persuaded some persons not to withdraw their deposits but when the bank has assets sufficient so that its officers expect to continue the business and pay all debts, are held, in *Stone v. Jenison*, (Mich.) 36 L.R.A. 675, to be lawfully made and not to constitute an illegal preference to that depositor, although the run continues until the bank is forced to suspend.

A claim that a bank was bound to apply to the payment of a note which it held a deposit of the first indorser was denied in *First Nat. Bank v. Peltz* (Pa.) 36 L.R.A. 832, where the note was made for his accommodation so that he, and not the apparent maker, was, as between themselves, primarily liable upon it.

Bicycle.

A license tax on a bicycle used for pleasure is held, in *Davis v. Petrinovich* (Ala.) 36 L.R.A. 615, to be unauthorized by a charter provision for a "vehicle license" to be imposed on vehicles used in the "transportation of goods and merchandise."

Bills and Notes.

Presentment to all the makers of a note is held, in *Benedict v. Schmieg* (Wash.) 36 L.R.A. 703, to be necessary in order to hold an indorser, whether the note is joint in form or joint and several. The previous authorities on presentment to joint makers to hold indorsers of a note are compiled in the annotation to the case.

Carrier.

The right of a carrier receiving blasting powder for transportation to insist upon such limitation of common-law liability as it sees fit is sustained, in *Cleveland Powder Works v. Atlantic & Pac. R. Co.* (Cal.) 36 L.R.A. 648, on the ground that a common carrier is not obliged to receive and transport such dangerous articles. Annotation to the case reviews the other authorities on the limitation of carrier's liability and duty in case of dangerous articles.

For baggage left on a depot platform by a passenger who arrived at the place after 11 o'clock at night, when there were no conveyances running by which he could take it away, the carrier was held, in *Kansas City Ft. S. & M. R. Co. v. McGahey*, (Ark.) 36 L.R.A. 781, to be liable only as a warehouseman, and not as a common carrier, if the baggage was burned during the night. The authorities as to the liability of carriers for baggage at destination of the passenger are reviewed in the annotation to the case.

The regulation of a carrier for collecting fares or tickets on a suburban train, which prohibits passengers from going past the conductor into the part of the train where he has completed his collection of fares unless they satisfy him that they have already paid fare, is held, in *Faber v. Chicago Great Western R. Co.* (Minn.) 36 L.R.A. 789, to be a reasonable one which the conductor was justified in enforcing, even as against a passenger who had no previous notice of it.

A reasonable charge for the detention of a carrier's cars beyond a reasonable time for loading or unloading is sustained in *Kentucky Wagon Mfg. Co. v. Ohio & M. R. Co.* (Ky.) 36 L.R.A. 850, and it was held that such charges may be imposed and enforced by a car service association.

Constitutional Law.

A statute requiring the destruction of peach trees attacked by the yellows, is held, in *State v. Main* (Conn.) 36 L.R.A. 623, to be within the discretion of the legislature as an exercise of the police power. The case also holds that the constitutionality of a statute is for the court to determine, and that it is the duty of the jury to accept the court's determination thereof even in a criminal case.

The power of a notary public to commit a witness for contempt in refusing to be sworn or give a deposition is denied in *Re Huron*, (Kan.) 36 L.R.A. 822, and a statute purporting to confer such power upon a notary is held void. The other authorities on notary's power to punish for contempt are compiled in the annotation to the case.

Contract.

The rule that death terminates an executory contract when the peculiar skill or taste of the party who dies is essential to the completion of the contract is held in *Cox v. Martin* (Miss.) 36 L.R.A. 800, to be inapplicable to the case of a deed of trust covering crops to be grown and some other personal property, although it was necessary for the other party to make advances and complete the crop.

County.

A sale and conveyance of an academy by a county to a presbytery is held, in *Jefferson County v. Grafton*, (Miss.) 36 L.R.A. 798, to be void unless made under legislative authority.

Damages.

The measure of damages for failing to deliver a building to a tenant as agreed is held, in *Jonas v. Noel* (Tenn.) 36 L.R.A. 862, to be the difference between the rent provided for and the value or rental value, rather than the market value of the property, where the building was to be erected for the tenant and was of such unprecedented size that no one but the tenant would be likely to make it serviceable in his business.

Municipal Powers.

The right to lay a private sewer in the streets of a city is held in *Stevens v. Muskegon* (Mich.) 36 L.R.A. 777, to be one which the city could grant by contract, and when a sewer had been constructed in accordance therewith, it was held that a vested right was obtained to its use.

Evidence.

An order for the production in court for analysis by experts and physicians of a specimen of the urine of the plaintiff who has testified that he is suffering from albumen and sugar in the urine as the result of an injury, is held proper, in *Cleveland C. C. & St. L. R. Co. v. Huddleston*, (Ind.) 36 L.R.A. 681; especially when he has voluntarily produced a specimen for his own counsel which has been analyzed by physicians selected by them and proof thereof offered in court.

As the law presumes sanity, it is held, in *State v. Scott* (La.) 36 L.R.A. 721, that an accused person who urges his insanity as a defence has the burden of proving it. The great number of cases on the presumption and burden of proof as to sanity are compiled in the annotation to the case.

Responsibility.

Escape of gas from a cracked elbow in a pipe which a gas company puts in, after repeated attempts to repair it and the assurance of its employee that it is all right, is held, in *Richmond Gas Co. v. Baker* (Ind.) 36 L.R.A. 683, to render the gas company liable for the resulting damages, where the persons were lulled by such assurances into a feeling of security, although able to smell the gas.

Non-navigable Stream.

The right of the owner of the soil to cut and remove ice from a non-navigable stream is sustained in *Gehlen v. Knorr* (Iowa) 36 L.R.A. 697, even to any extent, for his own use, whether for storage or sale, if it does not thereby appreciably diminish the amount of water that can be used by the lower proprietor, and the construction of a dam to collect and retain the water for this purpose to a reasonable extent is upheld.

Telephone Company.

The right of a telephone company to require a telegraph company to place a telephone instrument in its office for use in receiving and transmitting messages on the ground that it has allowed another telephone company to have an instrument there for that purpose is denied, in *People, ex rel. Cairo Teleph. Co. v. Western Union Teleg. Co.* (Ill.) 36 L.R.A. 637, on the ground that the telegraph company cannot be compelled to receive oral messages, and that by waiving its rights in that respect in favor of one company it is not compelled to do so in favor of another.

Lease.

A landlord is not exonerated from responsibility for the safe condition of an elevator in a building a portion of which is leased, where he retains the general control over the elevator and its approaches and expressly covenants that he will keep them in good condition, although the tenant and other tenants have the right to use it in common with the landlord. *Olson v. Schultz*, (Minn.) 36 L.R.A. 790.

Master and Servant.

The manner of delivering messages to railroad employees is held, in *Card v. Eddy*, (Mo.) 36 L.R.A. 806, not to constitute a part of the master's duty so as to make him liable for injuries to an employee by negligence of another who delivered the message entrusted to him by attaching it to a weight and throwing it from a moving train.

Negligence.

A state inspector of illuminating oil who brands it to indicate that he has approved it and that it bears the statutory test, when in fact it does not, is held, in *Hatcher v. Dunn* (Iowa) 36 L.R.A. 689, not to be liable for damages caused by the explosion of the oil if he used due care, and used instruments furnished and approved by the proper authorities, and especially if the explosion was due to a defective lamp rather than to the inferior grade of the oil.

Street Railway.

An ordinance requiring proper and suitable fenders on the front of electric cars to prevent accident, and making it unlawful to operate them in the streets without such fenders, is held, in *State ex rel. Cape May, D. B. & S. P. R. Co. v. Cape May* (N.J.) 36 L.R.A. 653, to be a valid exercise of the power to regulate the use of the streets. In another case of the same name on page 656, an ordinance regulating the speed of such cars is sustained, while a third case of the same name, on page 657, sustains an ordinance requiring such cars to come to a full stop before crossing intersecting streets.

The right of a street railway to run over a bridge built over a railroad at a highway crossing is sustained in *Pennsylvania R. Co. v. Greensburg J. & P. St. R. Co.* (Pa.) 36 L.R.A. 839. It is held that the railroad company is not an abutting owner that can contest such use of the bridge.

Jurisdiction.

Concurrent jurisdiction in the courts of different states for the garnishment of a foreign corporation which is doing business in each state by agents is held, in *Lancashire Ins. Co. v. Corbetts* (Ill.) 36 L. R. A. 640, to exist, and it is held that the jurisdiction is not determined by the situs of the debt, but by the liability of the garnishee to be sued at the place.

Insolvency.

Moneys collected by the trustees of an insolvent as the proceeds of sales made by him as commission merchant and which are capable of identification are held, in *Drovers' & M. Nat. Bank v. Roller* (Md.) 36 L. R. A. 767, to belong to the consignor, but general assets in the hands of the trustee are not chargeable with a lien in his favor.

Public Moneys.

A deposit of public moneys by a state treasurer in a legally constituted depository for public funds in compliance with the law is held, in *Bartley v. Meserve* (Neb.) 36 L. R. A. 746, to be in substance and legal effect a loan of the moneys so deposited, and he can deliver the funds to his successor without withdrawing the money and giving physical possession thereof.

SIR MELBOURNE TAIT.

The Province of Quebec, or Lower Canada, as it is still affectionately called by its people, has, in addition to a number of other interesting peculiarities, a system of jurisprudence and judicature which is comparatively unique.

Its civil law is practically the Code Napoléon, with certain changes, supposed to have been improvements; its commercial law is in effect similar to that of England; its constitutional law and criminal law and practice are distinctively English.

The use of both the French and English languages in the courts is a curious, if at times cumbersome, feature; and the familiar jest of Mark Twain, when visiting Montreal some years ago, may be repeated. He was being entertained at dinner, and in his speech (Canadians have a wonderful avidity for making and listening to speeches) said that he had that day heard a lawsuit concerning six cords of wood tried in two languages, and, no doubt if the litigation had been about one hundred cords, there

would not have been enough languages at the Tower of Babel to enable the suit to be tried.

However, every visitor to Montreal or Quebec hears about the dual language, and probably learns at the same time, from some illiterate cabman, that the French spoken in the Province is a rude *patois* and not the pure lingo of the boulevards; the fact being that Canadian French is pure Norman of the 16th century and, as spoken by the educated classes, as good as any dialect of modern France.

One peculiarity, and a regrettable one, of her position as a civil law province, is that she is isolated from the rest of the legal world, and the decisions of her tribunals and the careers and names of her jurists are unknown beyond the banks of the St. Lawrence.

And yet, from the day when in 1763 Great Britain, after administering, for a brief period, English law in the English language to the French Canadian *habitant*, restored the use of the French law, practically the *Coutume de Paris* (codified in 1867), to the present time, Lower Canada has had a long line of able and learned English and French judges. Stuart, a giant in intellect, Sewell, Lafontaine, Duval, Dorion, Johnson, Cross, Badgley, Panet, Rolland, Ramsay, Taschereau, Mondelet. Sanborn, Monk, Loranger, Meredith, Tessier and Fournier have, in their time, done judicial work, and pronounced judgments, of the highest value; but their names probably were never heard of by the American bar. To the proverbially ephemeral character of legal fame, therefore, an added obscurity is afforded in the case of the Quebec judges.

The Superior Court of the Province is the high court of original civil jurisdiction; all cases of over one hundred dollars are instituted before it. It consists of thirty judges, ten of whom sit in Montreal, four in Quebec, the remainder being scattered over the Province in districts and being summoned occasionally to sit in the cities for the purpose of assisting their brethren. The court has an appellate jurisdiction as well, and three judges sit at Quebec and Montreal every month. A chief justice and an acting or assistant chief justice are appointed by the Governor General in Council, one residing in Quebec, the other in Montreal.

On the death of the late Chief Justice Sir Francis Johnson, a man of great ability, and an accomplished French and English scholar, a wit, a *bon vivant*, and the hero of all the Canadian Joe

Millers, Mr. Justice Tait, the subject of this sketch, was selected to succeed him; but, in accordance with practice, the then Acting Chief Justice, Sir L. N. Casault of Quebec, was promoted to be Chief Justice, and Mr. Justice Tait was made Acting Chief Justice of the court at Montreal.

Sir Melbourne Tait was born in 1842, at Melbourne, a picturesque village on the St. Francis River in the Eastern Townships of the Province. His father was a leading merchant of the place, warden of the county and a Justice of the Peace, and was also a captain in the Canadian militia.

The future chief justice was educated at St. Francis College, Richmond, P.Q., and in 1859 began the study of law in Montreal, entering the law faculty of McGill University, where he graduated B.C.L. in 1862. He was admitted to the bar of the Province of Quebec in the following year and, after practicing law for a short time in his native place, he entered into partnership, in Montreal, with the late Sir John Abbott, Q.C., M.P., then, and for many years, one of the leaders of the Canadian bar, and afterwards Prime Minister of Canada.

The firm of Abbott, Tait & Wotherspoon had probably the largest practice in the Province, and were standing counsel for a large number of corporations, including the Canadian Pacific Railway Company and several leading banks. Mr. Abbott becoming engaged in railway enterprises and subsequently in political affairs, the management of the firm devolved largely on Mr. Tait and Mr. Wotherspoon. Mr. Tait conducted most of the court business of the firm, and the law reports of the Province show that he was the leading counsel in many of the heaviest commercial cases tried in Canada. For a number of years he was treasurer of the Montreal bar. In 1882 he was appointed Queen's Counsel, and in 1887 he was appointed a judge of the Superior Court, being made Acting Chief Justice for the Montreal division in 1894. Sir Melbourne Tait is a D.C.L. of McGill University, Montreal, and of Bishop's College, Lennoxville.

Since his appointment to the bench, he has been an assiduous and painstaking judge, and, especially since his nomination as acting chief justice, he has manifested a striking executive ability and the power of organizing his associates successfully. He is a prodigious worker, and has the faculty of inspiring others with a like zeal.

It would be foreign to the scope of this sketch to refer at any length to the cases decided by Judge Tait, but it may be stated

that he has been fortunate enough to see a very considerable number of his most important decisions confirmed either by the Supreme Court of Canada, or by the Judicial Committee of the Privy Council. To those interested in the subject, reference might be made to the Shefford Election case, 10 L.N. 403; *Vipond v. Findlay*, M.L.R., 7 S.C. 242; *Sise v. Pullman Palace Car Company*, Quebec Reports, 1 S.C. p. 9; *Canada Paint Company v. William Johnson & Sons (Ltd.)*, Quebec Reports, 4 S.C. 293; *Lambe v. Fortier*, Quebec Reports, 5 S.C. 47; *Canada Revue v. Fabre*, Quebec Reports, 8 S.C. 195; *Rendell v. Black Diamond Steamship Co.*, Quebec Reports, 10 S.C. 257; *Beach v. Corporation of Stanstead*, Quebec Reports, 8 S.C. 178; *Montreal Water & Power Company v. City of Montreal*, Quebec Reports, 10 S.C. 209, and many others.

His decisions of Sir Melbourne Tait are perspicuous, direct and to the point. He does not indulge in any sententious verbiage nor burden his judgments with jejune platitudes or unnecessary philosophical reflections, and his remarks are delivered in excellent judicial manner. He may possess, but never exercises, a somewhat favorite judicial art or artifice of shirking a difficult point and basing a decision on some minor question, not touched upon by counsel. His demeanor to the bar is excessively courteous and urbane, without in any manner lacking the dignity and repose which befit a magistrate.

In his social life, the learned Judge is a great favorite. When at the bar, he was a member of a well-known Dramatic Society—the Social and Dramatic Club of Montreal—and has performed leading parts in its productions with *éclat*. He is a member of the St. James Club of Montreal, and a churchwarden of Christ Church Cathedral. He is also a governor of Bishop's College.

His Knighthood by the Queen, on the occasion of her Diamond Jubilee, was an extremely popular appointment, and the judge received many felicitations on his honor, and was on September the 10th presented with a congratulatory address by the Bar of Montreal. Lady Tait is an American, a native of Rhode Island. Sir Melbourne has an interesting family, his eldest son, Mr. Thomas Tait, being Eastern manager of the Canadian Pacific Railway Company.

In the prime of life, possessed of a vigorous and robust constitution, fond of his work and competent to do it, respected and implicitly trusted by the profession and the public, Sir Melbourne Tait's lot is indeed an enviable one. But his freedom

from the vanity and petulance which sometimes mar the judicial character, and withal, the unaffected modesty of his nature, render it impossible for his successes to excite the lower forms of envy or to evoke other feelings than the belief that he thoroughly deserves his good fortune and the hope that he may long be spared to perform the important duties he is so admirably qualified to discharge.—*R. D. McGibbon, Q. C.*, in "*The Green Bag*," October.

A SUCCESSFUL FEMALE LAWYER—MRS. CLARA FOLTZ.

The *New York Times Illustrated Magazine*, speaking of Mrs. Foltz and her work, says:—

On an upper floor of a large building, overlooking busy and crowded Nassau street, New York, is the office of Mrs. Clara Foltz, one of the most prominent women lawyers in this country. On the walls hang certificates showing her right to practice in all the courts in California, the United States Supreme Court, and the courts of the State of New York.

After sixteen years of successful practice as a lawyer in California, Mrs. Foltz came to New York, and a little over a year ago was admitted to the New York bar, Gen. Benjamin F. Tracy, ex-Secretary of the Navy, acting as her sponsor. Since coming here she has been engaged in a number of leading cases, and has been uniformly successful. Her preference is for criminal cases, and she derives a handsome income from her practice, while many other women lawyers have a hard struggle to support themselves.

In fact, she could retire from business if she chose, but her ambition spurs her on to accomplish certain ends that she has in view. She wishes to build and endow a law college for women in her native State of California, and it is whispered would not be averse to a position on the judge's bench. Such lofty ambitions as these require many years before they can be fulfilled.

The career of Clara Foltz is a lesson for every woman. She was married when she was only fifteen years old, and was left a widow while she was still young, with five children to support. She bravely declined offers of aid from her relatives and declared her intention to study law. This, however, was easier said than done at that time in California. The new Constitution of the

State prohibited the admission of women to the bar, and the principal law college, Hastings, refused to admit her as a student.

Mrs. Foltz drew up an amendment to the Code, allowing women to practice law, and also brought suit against the trustees of the college for refusing her admission. She was successful in both instances, and in a short time she was a member of the bar. In one of her first cases she won \$75,000 damages for a woman client.

In a few years she had built up a good practice without neglecting her home duties. She established the *Santiago Daily Bee*, and took a great interest in politics, proving a valuable speaker for the Republican party.

Mrs. Foltz had always been a Republican, having followed in her father's footsteps, but during an exciting political campaign she took occasion to change her views. She was making speeches for the Republican mayoralty candidate in San Francisco, and one day dropped in at the State headquarters. The State Secretary made a slurring remark about women in politics, and Mrs. Foltz declared that she would leave the party for which she had been working so ardently. Since that time she has joined forces with the Democrats, although she sometimes sides with the People's party.

In California Mrs. Foltz was known as the modern Portia, the latter being one of her favorite heroines. She founded the Portia Law Club, and it still flourishes successfully in the Golden State.

Mrs. Foltz comes of a distinguished family. Her father was a prominent lawyer who left the bar to become a minister. Her brother, Samuel Shortridge, is a well-known corporation lawyer; another brother, Charles M. Shortridge, is editor and proprietor of the *St. Francisco Call*, and a third brother, John R., is mayor of Gainesville, Texas. She was herself the candidate of the People's party for city and county attorney in 1880.

One secret of Mrs. Foltz's success is her surprising energy. Her office hours are from 10 a. m. to 7.30 p. m., and a considerable portion of her time is given to the study of intricate cases. Yet with all this she does not neglect her social duties, and she has a large circle of friends. In appearance she is a tall, stately blonde, with a fine voice and a dignified manner. She pays considerable attention to her dress, which is always in the latest fashion. She has travelled extensively and been through a shipwreck and various other experiences, of which she talks entertainingly.

She is an ardent woman suffragist, but never forces her opinions on any one. She is glad to follow in the footsteps of Susan B. Anthony, whom she calls "the magnificent woman who struck the first blow for woman's rights at Rochester forty-eight years ago." She also says:—"I have proved that women possess that quality which men have arrogated to themselves alone—logic; but I have endeavored to do it in such a way as not to offend men's sensibilities."

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CURRENT TOPICS.

The retirement of the Master of the Rolls, the death of Mr. Justice Cave, and the resignation of Lord Ludlow, have opened three judgeships, and have led to other changes on the English Bench. Sir Edward Clarke, Q.C., was offered the position of Master of the Rolls, but although this office ranks third in dignity among judicial appointments, the offer was declined. It was then tendered to Lord Justice Lindley, and accepted. The appointment has been very generally commended, though the age of the newly appointed Master of the Rolls hardly justifies the expectation that he will be able for many years to discharge the onerous duties of the office unless he rivals Lord Esher in vigour and staying power. One of the vacant Lord Justiceships of Appeal has been filled by the promotion of Mr. Justice Vaughan Williams, of the High Court, and the other by the promotion of Mr. Justice Henn Collins, also of the High Court. These are both excellent appointments and acceptable to the profession. Mr. Justice Williams has been succeeded in the High Court by Mr. Arthur M. Channell, Q. C. The new

judge is the only surviving son of the late Baron Channell, of the Court of Exchequer. Mr. Justice Collins has been succeeded by Mr. Darling, Q. C. It may be noted that the newly appointed judges were sworn in openly in the Lord Chief Justice's Court, in the presence of a number of the judges and a large attendance of the Bar and the public, amongst the latter being several ladies.

The ex-Master of the Rolls (Viscount Esher), and ex-Lord Justice Lopes (Lord Ludlow), retire on ample allowances. Lord Esher is to receive an annuity of £8,750, for life, and Lord Ludlow £8,500, for life.

A change has also occurred in the judiciary of this Province. Mr. Justice Marc Aurèle Plamondon has retired from the bench of the Superior Court. Mr. Justice Plamondon was appointed a puisne judge of the Superior Court, for the judicial district of Arthabaska, on the 9th September, 1874, and has therefore completed twenty-three years of service. Only three of the present occupants of the Bench are his seniors, viz., Chief Justice Casault, and Justices Routhier and Bélanger. Mr. Justice Plamondon is succeeded by Mr. François-Xavier Lemieux, of the city of Quebec, son-in-law of the retiring judge. Mr. Lemieux was born in Levis. He was called to the bar in 1872. He was elected for Levis to the local legislature in 1883, and re-elected in 1886 and 1890. At the time of his appointment to the bench he was *bâtonnier* for Quebec, and also *bâtonnier-général* of the General Council of the Bar.

Attention was directed some time ago to the large number of rejections among aspirants to practice in England. The apparent severity of the examinations has not yet spurred students generally to attain the standard

of proficiency, for, in a recent examination, out of 114 candidates who presented themselves only 52 succeeded in passing.

Constables and detectives are doubtless fired with zeal to make the course of justice sure, but they should not allow their zeal to carry them too far. It seems to us that the severe remarks repeatedly made from the bench in England with reference to the extortion of confessions from criminals would apply to a recent case in this province, where the accused had to undergo several searching interrogations by officers of justice, until a confession was obtained. This is a proceeding which should not be encouraged nor even permitted. Juries, it is true, will naturally regard with considerable distrust admissions obtained under such circumstances, but this does not excuse the course pursued by the detectives.

NEW PUBLICATION.

TAYLOR'S MEDICAL JURISPRUDENCE. --Twelfth American edition, by Mr. Clark Bell, LL. D. Publishers, Lea Brothers & Co., New York and Philadelphia.

The present edition of this celebrated work is from the twelfth English edition, by Dr. Thomas Stevenson, and brings the subject of Medical Jurisprudence up to date. Lawyers will find in it a rich storehouse of judicial decisions, both by the courts of Great Britain and of the United States. The subjects of insanity, poisoning, etc., are fully treated. Medico-legal surgery is an important branch of knowledge in these days when actions for damages for personal injuries are so numerous, and considerable attention is given to it in this work. The American editor is a distinguished writer, publisher of the *Medico-Legal Journal* of New York, and has done his part well in making the work a complete treatise on the subject.

THE CARRIER'S LIABILITY: ITS HISTORY.

The extraordinary liability of the common carrier of goods is an anomaly in our law. It is currently called "insurer's liability," but it has nothing in common with the voluntary obligation of the insurer, undertaken in consideration of a premium proportioned to the risk. Several attempts have been made to explain it upon historical grounds, the most elaborate that of Mr. Justice Holmes.¹ His explanation is so learned, ingenious, and generally convincing, that it is proper to point out wherein it is believed to fall short.

His argument is in short this. In the early law goods bailed were absolutely at the risk of the bailee. This was held in Southcote's case,² and prevailed long after. The ordinary action to recover against a bailee was detinue. But as that gradually fell out of use in the seventeenth century its place was necessarily taken by case; and in order that case might lie for a non-feasance, some duty must be shown. There were two ways of alleging a duty: by a *super se assumpsit*, and by stating that the defendant was engaged in a common occupation. It was usual to include an allegation of negligence, from abundant caution, but that was "mere form." Chief Justice Holt³ finally overthrew the doctrine of the bailee's absolute liability, except where there was a common occupation, or (of course) where there was an express *assumpsit*. The extraordinary liability of a carrier is therefore a survival of a doctrine once common to all bailments.

Judge Holmes does not explain satisfactorily why this doctrine should not have survived in the case even of all common occupations, but only in the case of the common carrier of goods; nor does he account for the fact that the carrier is held absolutely liable, not merely, like the bailee once, for the loss of goods, but, unlike that bailee, for injury to them. The difficulties were not neglected from inadvertence, for he mentions them.⁴ But without laboring these points, his main proposition should be carefully considered. Is it true that the bailee was once absolutely

¹ The Common Law, Lecture V.

² 4 Co. 83 b; Cro. Eliz. 815. A fuller and better report than either of these is in a manuscript report in the Harvard Law Library, 42-45 Eliz. 109 b.

³ In *Lane v. Cotton*, 12 Mod. 472, and *Coggs v. Bernard*, 2 Ld. Raym. 909; *obiter* in both cases.

⁴ Page 199.

liable for goods taken from him? It may be so; Pollock and Maitland seem to give a hesitating recognition to the doctrine,¹ but the evidence is not quite convincing.

No one versed in English legal history will deny that the bailee of goods was the representative of them, and the bailor's only right was in the proper case to require a return; and therefore that when a return was required it was incumbent upon the bailee to account. Nor can it be doubted that the law then tended to lay stress on facts rather than reasons,—to hang the man who had killed another rather than hear his excuse. We should therefore not be surprised, on the one hand, to find that, where one had obliged himself to return a chattel, no excuse would be allowed for a failure to return. On the other hand, by the machinery of warranty, it was always possible to explain away the possession of an undesirable chattel; why not to explain the non-possession of a desired one? We should therefore not be greatly surprised if the authorities allowed some explanation.

Three actions were allowed a bailor against a bailee; detinue, account, and (after the Statute of Westminster) case. Let us see whether in either of these actions the defendant was held without the possibility of excuse.

Case lies only for a tort; either an active misfeasance, or, in later times, a negligent omission. There must therefore be at the least negligence; and so are the authorities. The earliest recorded action against a carrier is case against a boatman for overloading his boat so that plaintiff's mare was lost; it was objected that the action would not lie, because no tort was supposed; the court answered that the overloading was a tort.² So in an action on the case for negligently suffering plaintiff's lambs, bailed to defendant, to perish, it was argued that the negligence gave occasion for an action of tort.³ So later, in the case of an agister of cattle, the negligence was held to support an action on the case.⁴ In these cases the action would not lie except for the negligence.⁵ In the case of ordinary bailments, therefore, negligence of the bailee must be alleged and proved to support

¹ Hist. Eng. Law, 169.

² 22 Ass. 41 (1348).

³ 2 H. 7, 11, pl. 9 (1487).

⁴ Moo. 543 (1598).

⁵ The *assumpsit* is also mentioned in them; but this means, not a contract that they shall be safe, but an undertaking to perform a certain purpose. Holt, C. J., in *Coggs v. Bernard*, 2 Ld. Raym. 909, 919.

an action on the case against him. I shall hereafter consider actions on the case against those pursuing a common occupation.

In the action of account there is hardly a doubt that robbery without fault of bailee could be pleaded in discharge before the auditors.¹ To the contrary is only a single dictum of Danby, C.J., and there the form of action is perhaps doubtful.² Indeed, in Southcote's case the court admitted that the factor would be discharged before the auditors in such a case, and drew a distinction between factor and innkeeper or carrier.

In the action of detainue then, if anywhere, we shall find the bailee held strictly; and the authorities must be examined carefully.

The earliest authority is a roll where, in detainue for charters, the bailee tendered the charters *minus* the seals, which had been cut off and carried away by robbers. On demurrer this was held a good defence.³ The next case was detainue for a locked chest with chattels. The defence was that the chattels were delivered to defendant locked in the chest, and that thieves carried away the chest and chattels along with the defendant's goods. The plaintiff was driven to take issue on the allegation that the goods were carried away by thieves.⁴ A few years later, counsel said without dispute that if goods bailed were burned with the house they were in, it would be an answer in detainue.⁵

¹ Fitz. Accompt, pl. 111 (1348); 41 E. 3, 3 (1367); 2 R. 3, 14 (1478); Vere v. Smith, 1 Vent. 121 (1661).

² 9 E. 4, 40 (1469). In an action of account, the court held that robbery could not be pleaded in bar, but if it was an excuse it must be pleaded before the auditor. Danby's remark, that robbery excuses a bailee only if he takes the goods to keep as his own, has no reference to the action itself. Brooke abridges the case under *Detinue*, 27.

³ Brinkburn Chartulary, p. 105 (1299).

⁴ Fitz., *Detinue*, 59 (1315). According to Southcote's case and Judge Holmes (Com. Law, p. 178), Fitzherbert states the issue to have been that the goods were delivered outside the chest. Neither the first (1516) edition of Fitzherbert, nor others (1565, 1577) to which I have access, are so. In the printed book (8 E. 2, 275) it is indeed laid down as Gawdy and Holmes state it; we have therefore a choice of texts. It is common knowledge that Maynard's text is often corrupt; it is a century and a half further from the original; and in this case the inaccuracy is manifest. The text throughout has to be corrected by comparison with Fitzherbert in order to make it sensible. From internal evidence Fitzherbert's text must be chosen. It would be interesting to have a transcript of the roll.

⁵ 12 & 13 E. 3, 244 (1339).

Then where goods were pledged and put with the defendant's own goods, and all were stolen, that was held a defence; the plaintiff was obliged to avoid the bar by alleging a tender before the theft.¹ Finally in 1432, the court (Cotesmore, J.) said: "If I give goods to a man to keep to my use, if the goods by his mis-guard are stolen, he shall be charged to me for said goods; but if he be robbed of said goods it is excusable by the law."²

At last, in the second half of the fifteenth century, we get the first reported dissent from this doctrine. In several cases it was said, usually *obiter*, that if goods are carried away (or stolen) from a bailee he shall have an action, because he is charged over to the bailor.³

In several later cases the old rule was again applied, and the bailee discharged.⁴ There seems to be no actual decision holding an ordinary bailee responsible for goods robbed until Southcote's Case.⁵

This was *detinue* for certain goods delivered to the defendant "to keep safe." Plea, admitting the bailment alleged, that J.S. stole them out of his possession. Replication, that J.S. was defendant's servant retained in his service. Demurrer, and judgment for the plaintiff.

¹ 29 Ass. 163, pl. 28 (1355). Judge Holmes, following the artificial reasoning of Gawdy (or Coke?) says the pledge was a special bailment to keep as one's own. The reason stated by Coke is exactly opposed to that upon which Judge Holmes' own theory is based; it is that a pledgee undertakes only to keep as his own because he has "a property in them, and not a custody only," like other bailees. The court in the principal case knows nothing of this refinement. "For W. Thorpe, B., said that if one bails me his goods to keep, and I put them with mine and they are stolen, I shall not be charged." After refusal of tender, defendant would have been, not, as Judge Holmes says, a general bailee, but a tortious bailee, and therefore accountable. The refusal was the *detinue*, or as the court said in Southcote's case, "There is fault in him."

² 10 H. 6, 21, pl. 69.

³ 2 E. 4, 15, pl. 7, by Littleton (1462); 9 E. 4, 34, pl. 9, by Littleton and Brian, JJ. (1469); 9 E. 4, 40, pl. 22 (1469), by Danby, C. J. (*ante*); 6 H. 7, 12, pl. 9, per Fineux, J. (1491); 10 H. 7, 28, pl. 3, per Fineux, J. (1495). In the last two cases, Keble, *arguendo*, had stated the opposite view; and Brooke (*Detinue*, 37) by a query appears rather to approve Keble's contention.

⁴ 1 Harvard M. S. Rep. 3a (1589, stated later), *semble*; Woodlife's Case Moo. 462 (1597); Moseley v. Foisset, Moo. 543 (1598), *semble*.

⁵ 4 Coke 83 b, Cro. Eliz. 815; Harv. MS. Rep. 42-45 Eliz. 109 b (1600).

The case was decided by Gawdy and Clench, in the absence of Popham and Fenner; and it is curious that Gawdy and Clench had differed from the two others as to the degree of liability of a bailee in previous cases.¹ It would seem that judgment might have been given for plaintiff on the replication; the court, however, preferred to give it on the plea. This really rested on the form of the declaration; a promise to keep safely, which, as the court said, is broken if the goods come to harm. The only authority cited for the decision was the Marshal's Case, which I shall presently examine and show to rest on a different ground. The rest of Coke's report of the case (of which nothing is said in the other reports) is an artificial, and, *pace* Judge Holmes, quite unsuccessful attempt to reconcile, in accordance with the decision, the differing earlier opinions. The case has probably been given more authority than it really should have. At the end of the manuscript report cited we have these words: "Wherefore they (*cæteris absentibus*) give judgment for the plaintiff *nisi aliquod dicatur in contrario die veneris proximo*." And it would seem that judgment was finally given by the whole court for the defendant. In the third edition of Lord Raymond's Reports is this note: "That notion in Southcote's Case, that a general bailment and a bailment to be safely kept is all one, was denied to be law by the whole court, *ex relatione Magistri Bunbury*."² It was not uncommon for a case to be left half reported by the omission of a *residuum*; and it may be that Southcote's Case as printed is a false report. One would be glad to see the record.

Southcote's case is said to have been followed for a hundred years. The statement does it too much honor. It seems to be the last reported action of detinue where the excuse of loss by theft was set up; and, as has been seen, the principle it tries to establish does not apply to other forms of action. It was cited in several reported actions on the case against carriers, but seems never to have been the basis of decision; on the other hand, in *Williams v. Lloyd*,³ where it was cited by counsel, a general bailee who had lost the goods by robbery was discharged. The action was upon the case.

Having thus briefly explained why Judge Holmes' theory of the carrier's liability is not entirely satisfactory, I may now

¹ Woodlife's Case, Moo. 462; Mosley v. Fosset, Moo. 543.

² 2 *Ld. Raym.* 911 n.

Palmer, 548; W. Jones. 179 (1628).

suggest certain modifications of it. I believe, with him, that the modern liability is an ignorant extension of a much narrower earlier liability;¹ but the extension was not completed, I think, for eighty years after the date he fixes, and the mistaken judge was not Lord Holt, but Lord Mansfield.

From the earliest times certain tradesmen and artificers were treated in an exceptional way, on the ground that they were engaged in a "common" or public occupation; and for a similar reason public officials were subjected to the same exceptional treatment. Such persons were innkeepers,² victuallers, taverners, smiths,³ farriers,⁴ tailors,⁵ carriers,⁶ ferrymen, sheriffs,⁷ and gaolers.⁸ Each of these persons, having undertaken the common employment, was not only at the service of the public, but was bound so to carry on his employment as to avoid losses by unskilfulness or improper preparation for the business. In the language of Fitzherbert, "If a smith prick my horse with a nail, I shall have my action on the case against him without any warranty by the smith to do it well; for it is the duty of every artificer to exercise his art rightly and truly as he ought."⁹ By undertaking the special duty he warrants his special preparation for it. The action is almost invariably on the case.

One of the earliest cases in the books was against an innkeeper stating the custom of England for landlords and their servants to guard goods within the inn; it was alleged that while plaintiff was lodged in the inn his goods were stolen from it. There was no allegation of fault in the defendant, and on this ground he demurred; but he was held liable notwithstanding. The plaintiff prayed for a *capias ad satisfaciendum*. Knivet, J., replied, that this would not be right, since there was no tort supposed, and he was charged by the law, and not because of his fault; it was like the case of suit against the hundred by one robbed within it; he ought not to be imprisoned. The plaintiff was

¹ See *The Common Law*, pp. 199, 200.

² 11 H. 4, 45, pl. 8; 22 H. 6, 21, pl. 38; *ib.* 38, pl. 8.

³ 46 E. 3, 19.

⁴ Often called "common marshal." 19 H. 6, 49, pl. 5.

⁵ 1 Harv. M.S. Rep. 3a.

⁶ These were "country" carriers; the term did not at first include carriers by water.

⁷ 41 Ass. 82.

⁸ 33 H. 6, 1, pl. 3.

⁹ F. N. B. 94 d.

forced to be content with an *elegit* on his lands.¹ A few years later a smith was sued for "nailing" the plaintiff's horse; the defendant objected that it was not alleged *vi et armis* or *malitiose*, but the objection was overruled, and it was held that the mere fact of nailing the horse showed a cause of action.² An action was brought against a sheriff for non-return of a writ into court; he answered that he gave the writ to his coroner, who was robbed by one named in the exigent. He was held liable notwithstanding, Knivet, J. saying, "What you allege was your own default, since the duty to guard was yours."³

In 1410, in an action against an innkeeper, Hankford, J. used similar language: "If he suffers one to lodge with him he answers for his goods; and he is bound to have deputies and servants under him, for well keeping the inn during his absence."⁴ A noteworthy remark was Judge Paston's a few years later: "You do not allege that he is a common marshal to cure such a horse; and if not, though he killed your horse by his medicines, still you shall not have an action against him without a promise."⁵ Soon after was decided the great case of the Marshal of the King's Bench.⁶ This was debt on a statute against the Marshal for an escape. The prisoner had been liberated by a mob; the defendant was held liable. The reason was somewhat differently stated by two of the judges. Danby, J. said that the defendant was liable because he had his remedy over. Prisot, C.J. put the recovery on the ground of negligent guard. This case was frequently cited in actions against carriers; but not, I think, in actions against ordinary bailees before Southcote's Case.

The earliest statement of the liability of a common carrier occurs, I think, in the Doctor and Student (1518), where it is said that, "if a common carrier go by the ways that be dangerous for robbing, or drive by night, or in other inconvenient time, and be robbed; or if he overcharge a horse whereby he falleth into the water, or otherwise, so that the stuff is hurt or impaired;

¹ 42 E. 3, 11, pl. 13 (1367). In 43 E. 3, 33, pl. 38, it was alleged that a "marshal" had undertaken to cure a horse, but had proceeded so negligently that the horse died. The defendant was driven from a denial of the undertaking, and was obliged to traverse the defect of care.

² 46 E. 3, 19, pl. 19 (1371).

³ 41 Ass. 254, pl. 12 (1366).

⁴ 11 H. 4, 45, pl. 18 (1410).

⁵ 19 H. 6, 49 pl. 5 (1441).

⁶ 33 H. 6, 1, pl. 3 (1455).

that he shall stand charged for his misdemeanor."¹ In the time of Elizabeth, the hire paid to the carrier was alleged as the reason for his extraordinary liability.² Finally, in *Morse v. Slue*³ the court "agreed the master shall not answer for inevitable damage, nor the owners either without special undertaking; when it's *vis cui resisti non potest*; but for robbery the usual number to guide the ship must be increased as the charge increaseth."

Thus stood the law of carriers and of others in a common employment down to the decision in *Coggs v. Bernard*.⁴ Two or three things should be noted. First, carriers are on the same footing with many other persons in a common employment, some bailees and some not, but all subjected to a similar liability, depending upon their common employment; and there is no evidence in the case of these persons of anything approaching a warranty against all kinds of loss. The duty of the undertaker was to guard against some special kind of loss only. Thus the

¹ Doctor and Student, c. 38. A little later is found this curious case, Dall. 8 (1553). "Note by Browne, J., and Portman, J., as clear law; if a common carrier takes a pack of stuff from a man to carry it to D. and while in a common inn the pack is taken and stolen, the owner for this shall have an action against the innkeeper for the stuff and the carrier shall not; for they are not the goods of the carrier, nor shall he be charged with them inasmuch as he was by law compellable to carry them; and it is not like where one takes goods to carry generally, for if he be robbed, it shall be charged to the carrier for his general taking, to which he was not compellable, and so he shall have action over in respect of his liability." This is the only hint at a less liability of the common carrier than of the private carrier. It is interesting to notice that it was regarded as the duty of the innkeeper, and not of the carrier, to guard the goods in the inn. The duty is imposed by law for a purpose that purpose is served by putting the duty on the innkeeper here; the law need not require a double service.

² "It was held by all the Justices in the Queen's Bench, that if a man bail certain cloths to a tailor to make a robe of them, who does so, and then it is stolen out of his shop, still he shall be accountable for it; the same is law of a carrier who has anything for his labor. But it is otherwise of him who has nothing for keeping it, but keeps it of his good will."

³ 1 Harv. MS. Rep. 3a. To the same effect is *Woodlife's Case*, as reported in 1 Rolle's Abridgment, 2, as follows: "If a man deliver goods to a common carrier to carry, and the carrier is robbed of them, still he shall be charged with them, because he had hire for them, and so implicitly took upon him the safe delivery of the goods; and therefore he shall answer for the value of them if he be robbed."

⁴ 3 Keb. 135 (1672).

⁵ *Ld. Raym.* 909 (1703).

gaoler warranted against a breaking of the gaol, but not against fire; the smith warranted against pricking the horse; the inn-keeper against theft, but not against other sorts of injury;¹ the carrier against theft on the road, but probably not against theft at an inn.

Secondly.—This is put on different grounds; but all may be reduced to two. On the one hand, it may be conceived that the defendant has undertaken to perform a certain act which he is therefore held to do; either because the law forces him into the undertaking (as a hundred is forced to answer a robbery), or, as seems to have been in Judge Paston's mind, because there was some consent which took the place of a covenant. On the other hand, it may be conceived that the defendant has so invited the public to trust him that certain avoidable mischances should be charged to his negligence; he ought to have guarded against them. "The duty to guard" is the sheriff's or the carrier's or the innkeeper's; he is bound to have deputies for well keeping the inn; if a mob breaks in he shall be charged for his negligent guard; the usual number must be increased as the charge increases; if he go by the ways that be dangerous, or at an inconvenient time, he shall stand charged for his misdemeanor. It is to be remembered that during this time case on a *super se assumpsit* had this same doubtful aspect; to use a modern phrase, it was even harder then than now to tell whether such an action sounded in contract or in tort. The test of payment for services is a loose and soon abandoned method of ascertaining whether the defendant was a private undertaker or in a common employment.²

Another thing important to notice is that all precedents of declarations against a carrier or an innkeeper allege negligence.³ It is of course impossible to prove that this did not become a mere form before rather than after Lord Holt's time; but it is on the whole probable that it originally had a necessary place.

We have now brought the development of the law to the great case of *Coggs v. Bernard*.⁴ This was an action against a gratuitous carrier, and everything said by the court about common

¹ *Dawson v. Chamney*, 5 Q. B. 164.

² *Woodlife's Case*, Moore, 462, makes that clear, I think. Though both are paid, a distinction is drawn between factor and carrier.

³ *Holmes, Common Law*, 200.

⁴ 2 Ld. Raym. 909 (1703).

carriers was therefore *obiter*. Three of the judges did, however, treat the matter somewhat elaborately. Gould, J., put the liability squarely on the ground of negligence: "The reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect. When a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he had the goods committed to his custody upon those terms." Powys, J. "agreed upon the neglect." Powell, J. emphasized the other view, that "the gist of these actions is the undertaking.....The bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, &c. So it is in 1 Jones, 179; Palm. 548. For the bailee is not bound upon any undertaking against the act of God." Holt, C.J. seized the occasion to give a long disquisition upon the law of bailments. In the course of it he said that common carriers are bound "to carry goods against all events but acts of God and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable." And the reason is, that otherwise they "might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves," &c.

Was this the starting point of the modern law of carriers? It seems to be a departure from the previous law as I have stated it, but how far departing depends upon what was meant by act of God. Powell appears to include accidental fire, and cites a case where the death by disease of a horse bailed was held an excuse. Lord Holt does not explain the term; but his reasoning is directed entirely to loss by robbery. That "act of God" did not mean the same thing to him and to us is made probable by the language of Sir William Jones,¹ whose work on Bailments follows Lord Holt's suggestions closely. After stating Lord Holt's rule as to common carriers, he adds that the carrier "is regularly answerable for neglect, but not, regularly, for damage occasioned by the attacks of ruffians any more than for hostile violence or unavoidable misfortune," but that policy makes it "necessary to except from this rule the case of robbery." As to act of God, "it might be more proper, as well as more decent, to substitute in its place inevitable accident," since that would be a

¹ Bailments, pp. 103 *et seq.*

more "popular and perspicuous" term. He cites the case of *Dale v. Hall*,¹ which appeared to have held the carrier liable though not negligent; but explains that the true reason was not mentioned by the reporter, for there was negligence. Much the same statement of the law of carriers is made by Buller in his *Nisi Prius*.² It would seem, then, that the change in the law which we should ascribe to Lord Holt was one rather in the form of statement than in substance; but the new form naturally led, in the fulness of time, to change in substance.

In the fulness of time came Lord Mansfield, and the change in substance was made. In *Forward v. Pittard*,³ we have squarely presented for the first time a loss of goods by the carrier by pure accident absolutely without negligence,—by an accidental fire for which the carrier was not in any way responsible. Counsel for the plaintiff relied on the language of Lord Holt. Borough, for the defendant, presented a masterly argument, in which the precedents were examined; the gist of his contention was, that a carrier should be held only for his own default. Lord Mansfield, unmoved by this flood of learning, held the carrier liable; and he uttered these portentous words: "A carrier is in the nature of an insurer."

From that time a carrier has been an insurer without the rights of an insurer.—*Joseph H. Beale, in "Harvard Law Review."*

THE NEWLY APPOINTED MASTER OF THE ROLLS.

The Queen has been pleased to approve the appointment of the Right Hon. Lord Justice Lindley to be Master of the Rolls, in the place of Lord Esher, resigned. Sir Nathaniel Lindley is the only son of the late Dr. John Edward Lindley, F.R.S., who was Professor of Botany at University College, London, where the new Master of the Rolls was educated. He is sixty-nine years of age, having been born at Acton Green in 1828. The period of his active connection with the law is only three years short of half a century; he was called to the Bar at the Middle Temple in 1850. It was as an author that he laid the foundations of his success at the Bar. His treatise on "The Law of Partnership," which immediately obtained a large measure of success,

¹ 1 Wils. 281.

² Page 69 (1771),

³ 1 T. R. 27 (1785).

has become, through the merits of successive editions, a legal classic, while his "Study of Jurisprudence" gave early promise of that wide legal learning which has distinguished Sir Nathaniel Lindley on the Bench. The honour of silk was conferred upon him in 1872, and he at once obtained a leading position in Vice-Chancellor Hall's Court, where his chief opponent was Mr. Dickinson, Q.C. His appointment as a Queen's Counsel was followed within an exceptionally short period by his appointment as a judge. This was in 1875, when it was thought that equity and common law had been so fused by the Judicature Act that Chancery judges could be chosen to preside in common law Courts. The appointment of Mr. Lindley to the Common Pleas proved an unqualified success, but other equity lawyers showed themselves to be less adapted to the work of the common law Courts, and the fusion that was predicted so confidently now seems farther off than ever. Sir Nathaniel Lindley was created a serjeant-at-law before he became a judge of the Common Pleas. Within a few months of his appointment he became, owing to the operation of the Judicature Act, a judge of the Common Pleas Division of the High Court of Justice, and in 1879 he became a judge of the Queen's Bench Division. He was promoted to the Court of Appeal in 1881, and since the retirement of Lord Justice Cotton he has been the presiding member of Appeal Court II. As chairman of the Council of Legal Education—an office he held for four years—he proved the deep interest he takes in the welfare of the profession of which he is so distinguished and esteemed a member.—*Law Journal*.

GENERAL NOTES.

SOLICITOR AND CLIENT.—It is settled law that a solicitor has an implied authority to compromise an action in which he is retained for one of the parties. Even when the settlement has been made in violation of the client's prohibition, it has been held that the latter is bound, provided that the other party has acted *bona fide* and without notice of such prohibition, though, of course, the solicitor is in such cases liable to the client for his breach of duty. As regards the power of a solicitor to settle a claim before the issue of a writ which he is retained to prosecute, there has hitherto been little authority. The only reported case bearing directly on the point seems to be *Duffy v. Hanson*, 16 L.J. (N.S.) 332, in which Mr. Justice Willes ruled at Nisi Prius that

a compromise entered into before the issue of a writ by an attorney's clerk was not binding on the client. The Court of Appeal has just held that the same rule applies where a solicitor before action brought accepted a small sum in discharge of his client's claim without the latter's sanction. Why the issue of a writ should make a difference in the authority of the solicitor is by no means obvious. It is, however, unsatisfactory that a client should ever be bound by a compromise made without his knowledge or approval, and for this reason the decision of the court is a welcome one.—*Law Journal (London)*.

THE LAW OF EVIDENCE.—We recommend to the attention of the opponents of the Criminal Evidence Bill a case heard before Mr. Alderman Davies at the Guildhall Police Court on October 19. A wife was charged with the forgery of her husband's indorsement on a bill of exchange. The husband was not a competent witness either to allege or deny the genuineness of the indorsement, or the authority of the wife to make it for him. This state of the law may on the one hand enable a husband or wife with impunity to forge the name of the other; or on the other hand may subject an innocent husband or wife to a suspicion, which cannot be dispelled by sworn evidence, of having committed such an offence.—*Ib.*

NOVEL ACTION OF DAMAGES.—A case of almost novel impression has recently been decided in North Carolina. The holding is that the sale of laudanum as a beverage to a married woman, knowing that it is injuring her mentally and physically, and causing loss to her husband, when continued after his repeated warnings and protests, subjects the seller to a right of action in favour of the husband. This is founded on an old decision in the Supreme Court of New York, and these are the only cases of the kind on record. The doctrine apparently ignores the free moral agency of the wife, but it may be supportable on the same ground that warrants an action of damages for seduction of the wife. Some stress was laid in argument on the novelty of the cause of action, but the Court wisely gave no heed to it. The novelty of the action certainly is no greater than that of a very recent one in New York, in which a man who, in the belief that a woman was virtuous, was induced to marry her by the false representations of a third person by whom she was then pregnant, was allowed to recover damages from the latter on the ground of loss of society,

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CURRENT TOPICS.

Promotions have been rather in order of late years, in filling the higher positions on the English bench. Every member of the present Court of Appeal, except Lord Justice Rigby, has served as a judge of first instance before being elevated to the appeal bench. Out of twenty-eight Lords Justices since 1865, eighteen were promoted from lower courts. This system has the advantage of giving a safer field for the selection of those who have shown the highest judicial qualifications, but *per se* the system of promotion of judges has considerable drawbacks.

The name of Mr. Arthur Globensky, Q. C., has been mentioned in the press in connection with the proposed addition to the bench of the Circuit Court in Montreal. Mr. Globensky's eminent qualifications for the position cannot be doubted, and if the honor should fall to him the appointment would be extremely satisfactory both to his present *confrères* and to the public generally.

Even judges in these days seem to be affected by the desire to "break the record." Mr. Justice Field, of the United States Supreme Court, is said to have retained his seat some years longer than he otherwise would, because he wished to surpass Chief Justice Marshall in length of

service. He has now been on the Supreme Bench 34 years and seven months, whereas Chief Justice Marshall's term was 34 years and five months. Mr. Justice Field is to retire on 1st December.

The regents of the University of the State of New York have published, as bulletin 38, a compilation of all the laws, ordinances and by-laws pertaining to higher education in that state. It includes not only the University law, but also the educational articles from the constitution and the various statutes governing professional education and licenses to practise, and other allied matters. Its practical utility is increased by annotations and cross-references and by a very full index. Lawyers or others interested may obtain copies from the regents' office, post free, for 15 cents for the 108 pages.

The proposal that judges in the Courts of the United States shall wear gowns is not welcome in some quarters. Here are a few curious specimens of the arguments urged against the gown by legal journals. Says one:—"The rapid strides of civilization have done away with many useful customs, but there never was any use for a gown to be worn by a judge of any court. The uncivilized man might be excused for bedecking his body with ram's horns, buffalo tails, etc., but for a judiciary of an enlightened country, in this century, to be wrapped up in a gown—never! . . . With as much reason, wrap a horse blanket around the country peace justice, when he sits in judgment on a \$2 claim, as to robe the judges of our courts in black gowns during their sittings in court." Another contemporary is arithmetical and economical. "Gowns," he says, "cannot aid a court in the administration of justice; they are not only inconvenient but a tax upon the time of the judges. It is perhaps not too much to say that ten minutes to gown and ten minutes to ungown would not be an unreasonable time. If the court were in session 250 days in the year, there being seven judges, this would

be equivalent to the time of one judge, 588 hours spent in gowning and ungowning, or seventy-two days of eight hours each. Would not these seventy-two days of a judge's time be better spent in writing opinions than in gowning and ungowning?" The notion that a judge's whole time must necessarily be devoted to hearing and deciding cases is a mistaken one. The time spent by a judge in putting on or off a gown is no more wasted than the time spent in shaving, or in getting his hair cut. It does not take a single minute in the year from his sittings in court.

*MARRIAGE—WIFE'S CONCEALMENT OF PREG-
NANCY AT TIME OF MARRIAGE.*

Sir Francis Jeune, president of the English Probate, Divorce and Admiralty Division, gave judgment on the 5th June, 1897, in the case of *Moss v. Moss*. This was a suit in which the husband sought for a decree of nullity on the ground of the wife's fraud in concealing from him the fact that she was *enceinte* by another man at the date of the marriage. The suit was undefended, but, at the suggestion of the president, the attorney-general instructed the Queen's proctor to argue the case against the petitioner. The case was argued on May 20th last, and was fully reported in *The Times* on May 21st.

Judgment was then reserved, and on June 5th, 1897, the president delivered the following considered judgment:—

In this case the petitioner seeks to have his marriage with the respondent declared null and void, on the ground that, without his knowledge in fact, and without any neglect on his part to make himself acquainted with the truth, his wife was pregnant by another man at the time of his marriage with her. I find that these allegations of fact were proved. It was also stated that the connection of the respondent with the father of her child was incestuous. The proof of this was not made complete. I do not know whether it could have been; but the allegation was admitted to be immaterial for the purposes of the present case. Had the connection been with a relative, within the forbidden degrees, of the petitioner, there is high authority for saying that the marriage would have been incestuous and void. On these facts, the argument before me was that there was fraud

by the wife in regard to the essentials of marriage, and that, therefore, the marriage was null and void. It would perhaps be sufficient for me to say that for this proposition no authority in the English law can be found, and it would be impossible for this court, at the present day, to give assent to a principle of such importance, and so far-reaching, without the sanction of precedent. The absence of English authority was, indeed, almost, if not quite, admitted on behalf of the petitioner, and the argument in his favor was mainly based on the reasoning in decisions of some of the American courts. But the case was argued by Mr. Deane with so much earnestness and ability that I feel bound to state my view of the English authorities to which he referred, and to indicate the difference, as I conceive it to exist, between the law as understood in England and that laid down in certain States of America on the point in question.

In the case of *Swift v. Kelly*, 3 Knapp, 257, 203, decided in 1835, the Judicial Committee of the Privy Council, Lord Brougham, Baron Parke and Vice-Chancellor Shadwell being members of the board, expressed its opinion in the following terms: "It should seem, indeed, to be the general law of all countries, as it certainly is of England, that unless there be some positive provision of statute law, requiring certain things to be done in a specified manner, no marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances consent never would have been obtained. Unless the party imposed upon had been deceived as to the person, and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made." It is not necessary to inquire how far the law of other countries may be supposed at that time to have been the same as that of this country; but I think that the above words do represent with substantial accuracy the law of England. While habitually speaking of marriage as a contract, English lawyers have never been misled by an imperfect analogy into regarding it as a mere contract, or into investing it with all the qualities and conditions of ordinary civil contracts. They have expressed their sense of its distinctive character in different language, but always to the same effect. Lord Stowell said that it was both a civil contract and a religious vow (*Turner v. Meyers*, 1 Consist. 414), referring, no doubt, mainly to the incapacity of the contracting parties to dissolve it. Dr. Lushington spoke of it as more than a civil con-

tract: *Mills v. Chilton*, 1 Rob. 684. Lord Hannen said: "Very many serious difficulties arise if marriage be regarded only in the light of a contract. It is, indeed, based on contract of the parties, but it is a status arising out of a contract." *Sottomayer v. DeBarros*, 5 P.D. 94.

The late President Sir Charles Butt said, in the case of *Andrew v. Ross*, 14 P.D. 15, that "the principles prevailing in regard to contract of marriage differ from those prevailing in all other contracts known to the law." It is not necessary to enumerate all those differences. The most striking of them are familiar. The parties who contract a marriage cannot at their will dissolve it. Excepting for the moment such fraudulent concealment or misrepresentation as is alleged in the present case, no fraudulent concealment or misrepresentation enables the defrauded party who has consented to it to rescind it. Incapacity to consent arising from mental weakness is a fatal objection, not only if urged by or on behalf of the person unable to consent, but if put forward by the capable party to the contract: See *Hunter v. Edney*, 10 P.D. 98; *Durham v. Durham*, *ibid*, p. 80. Again, if both parties to the contract knowingly and wilfully marry without compliance with the law as to publication of banns, either can have the marriage declared null: *Andrews v. Ross*, 14 P.D. 15—a state of the law which drew from the late president the observation above quoted. I do not mean that, regarding marriage as a contract, explanations more or less far-fetched might not be given of these peculiarities, in order to force the law of marriage into line with the law of ordinary civil contract, but English courts have not resorted to these expedients, and while not taking a pedantic objection to the use of the term contract as applied to marriage, they have been content to recognize characteristic peculiarities in the nature and incidents of the marriage contract.

The result is that the English law of the validity of marriage is clearly defined. There must be the voluntary consent of both parties. There must be compliance with the legal requirements of publication and solemnization, so far as the law deems it essential. There must not be incapacity in the parties to marry, either as respects age and physical incapacity, or as respects relationship by blood or marriage. Failure in these respects, but I believe in no others (I omit reference to the peculiar statutory position of the descendants of George II.), renders the marriage void or voidable. It has been repeatedly laid down that a mar-

riage may be declared null on the ground of fraud or duress. But, on examination, it will be found that this is only a way of amplifying the proposition long ago laid down (*Fulford's Case*, Ch. 482, 488, 493) that the voluntary consent of the parties is required. In the case of duress with regard to the marriage contract, as with regard to any other, it is obvious that there is an absence of a consenting will. But when in English law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent. The simplest instance of such fraud is personation, or such a case as that supposed by Lord Ellenborough in *Reg. v. Burton-on-Trent*, 3 M. & S. 537, or a man assuming a name to conceal himself from the person to whom he is to be married. In *Portsmouth v. Portsmouth*, 1 Hagg. Eccl. Rep. 355, and *Harrod v. Harrod*, 1 K. & J. 4, the fraud consisted in taking advantage of a mind not absolutely insane, but weak, to induce in the one case a man, in the other a woman, to enter into a contract which (to use the phrase of Vice-Chancellor Wood in the latter case) he or she did not understand. *Browning v. Reane*, 2 Phill. 69, and *Wilkinson v. Wilkinson*, 4 N. of C. 295, are other cases of the same kind.

In all these, and I believe in every case where fraud has been held to be the ground for declaring a marriage null, it has been such fraud as has procured the form without the substance of agreement, and in which the marriage has been annulled, not because of the presence of fraud, but because of the absence of consent. This is illustrated by the imaginary case suggested by Lord Campbell in *Reg. v. Mills*, 10 Cl. & F. 534, 735, of a mock marriage in a masquerade where the kind of result which fraud might have produced would be produced by mistake. In such an instance there would be no fraud, but for want of real consent the marriage would be declared void. But when there is no consent, no fraud inducing that consent is immaterial. Lord Stowell has at least three times expressed this in the most emphatic language. In *Wakefield v. Mackay*, 1 Phil. 134, 137, that learned judge said—"Error about the family or fortune of the individual though procured by disingenuous representations does not at all affect the validity of the marriage;" in *Ewing v. Wheatley*, 2 Consist. 183—"It is perfectly established that no disparity of fortune, or mistake as to the qualities of the person will impeach the *vinculum* of marriage," and in *Sullivan v. Sullivan*, 2 Consist. 248—"The strongest case you could imagine of the most deliber-

ate plot, leading to a marriage, the most unseemly in all proportions of rank, of fortune, of habits of life, even of age itself, would not enable the court to release him from claims which, though forged by others, he has riveted on himself. If he is capable of consent and has consented, the law does not ask how the consent has been induced." The only authorities which were before me, referred to as in any degree inconsistent with these views, are the case of *Miss Turner's Marriage Act*, and a *dictum* of the late president in *Scott v. Sebright*, 12 P.D. 21; neither of these deals with such facts as are relied on in the present case, and this case I put forward, at most, as sanctioning a somewhat wider application of this doctrine of fraud as a ground for annulling marriage than the above authorities indicate. In the case of *Miss Turner* the marriage was annulled by act of Parliament.

It is not possible to say exactly on what ground the votes of the legislators were given; but it is suggested that the marriage was brought about, as indeed it was, by conduct into which fraud largely entered. It might be sufficient to say of this decision that, as was pointed out in *Templeton v. Tyree*, 2 P. & D. 420, it was an act of the Legislature, not necessarily, therefore, proceeding on the principles of the Ecclesiastical Courts which, in nullity cases, are the guide of this tribunal. It is also to be remarked that, in fact, the case was never brought before the Ecclesiastical Court, though, no doubt, the omission to do so was explained by Lord Eldon in the House of Lords and Mr. Peel in the House of Commons to have been caused by this impossibility of placing the evidence of *Miss Turner*, as a party, before the Ecclesiastical Courts; *Hansard*, vol. 17, pp. 787, 1134. But a stronger observation, I think, is that duress is distinctly alleged in the petition (*House of Lords Journal*, vol. 59, p. 308), and that the evidence in the case clearly proved that not only by fraudulent misrepresentations of fact but by duress of threats, such apparent consent as was given was extorted from the victim of this treatment. In *Scott v. Sebright*, 12 P.D. 21, 23, the late president said—"The courts of law have always refused to recognize as binding contracts to which the consent of either party has been obtained by fraud or duress, and the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract." Standing by themselves, these words may appear capable of a wider effect than any other English authority of which I am aware would warrant.

But read in connection with the facts before the court, which showed a case of deception and force acting on a weakened mind, they do not appear to me to go further than to lay down that in the case of marriage, as in that of other contracts, fraud and duress may be so employed as to render an apparent consent in truth no consent at all.

The principles thus long and uniformly asserted by the English courts, and the very fact that the point has never been raised, appear to me to be so conclusive on the present question that, even if it could be shown that authority to the contrary could be found in the canon law, I should say that that authority has not been accepted in this country. But as a fact I think that the principles above indicated may be traced back to the canon law. The canon law clearly refuses to allow a marriage to be declared null on the ground of previous unchastity of the wife, and it goes far to declare that the only fraud which vitiates marriage is that which goes to the consent. Ayliffe in his "Parergon" (p. 361) says: "Matrimony ought to be contracted with the utmost freedom and liberty of consent imaginable, without fear of any person whatsoever; for matrimony contracted through any menace or impression of fear is null and void *ipso jure*; * * * for marriages contracted against the will of either of the parties are usually attended with very bad and dismal consequences. * * * I have just now observed that the principal thing required to a legal marriage is the consent of the parties contracting, which is sufficient alone to establish such a marriage. And though there is nothing more contrary to consent than error, yet every error does not exclude consent, wherefore I shall here consider what kind of error it is, according to the canon law, that hinders or impeaches a matrimonial consent and renders it null and void *ab initio*. Now there are four species of error which are hereunto referred. The first is styled *error personæ*, as when I have thoughts of marrying Ursula, yet by my mistake of the person I have married Isabella. For an error of this kind is not only an impediment to a marriage contract, but it even dissolves the contract itself, through a defect of consent in the person contracting it. For deceit is oftentimes wont to intervene in this case, which ought not to be of any advantage to the person deceiving another. A second species is styled an error of condition; as when I think to marry a free woman, and through a mistake I have contracted wedlock with a bondwoman, and so *vice versa*, for by the canon law such an error is an impediment

to a matrimonial contract. But as there is now no such thing among Christians as persons that are truly bondmen or bondwomen (this kind of bondage or servitude being now abolished among us by the advantage of the Christian religion) I shall not long insist on this head. But if a freedman married a bondwoman, knowing her to be such, the church did not dissolve such a marriage. And thus we read that the marriage between Abraham and Agar the handmaid was a true and valid marriage. The third species is what we call *error fortunæ*, and is when I think to marry a rich wife and in truth have contracted matrimony with a poor one. But this error does not, even by the canon law, dissolve a marriage contract made simply and without any condition subsisting. But it is otherwise by that law if I have contracted with a person to marry her upon condition that she is worth so many thousand pounds, and the condition is not made good. The last species is styled an error of quality—viz., when a person is mistaken in respect of the other's quality, with whom he or she contracts. As when a man marries Berta, believing her to be a chaste virgin, or of a noble family and the like, and afterwards finds her to be a person deflowered or of a mean parentage. But according to the common opinion of the doctors this does not render the marriage invalid; because matrimony celebrated under such kind of error, in point of consent, is deemed to be simply voluntary as to the nature and substance of it, though in respect of the accidents it is not voluntary."

While the above is, as I believe, the correct view of the English law, there is no doubt, not only that the law of other countries is not the same on the point in question, but also that in America the difference has been arrived at by arguments which proceed on principles embodied in the English law. It is not, of course, necessary to examine in any detail the positive enactments of any other country nor the law of any country whose system of jurisprudence is not the same as our own. The law of the Civil Code of France, the German Protestant Ecclesiastical law, the Prussian, Austrian, and Italian Codes will be found collected in Fraser on Husband and Wife, according to the law of Scotland (vol. 1, p. 452). It is, however, curious to observe how the tribunals of some of these countries have deduced from the principle of nullity of marriage on account of error in the person (which English law treats only as a question of identity) the conclusion that concealed pregnancy, or even loss of virginity, vitiate marriage.

Thus, a French court, applying the language of the Code, *erreur dans la personne* to the case of *erreur sur la personne morale*, has held a marriage void on account of concealed pregnancy, a view rejected by the commission which prepared the Italian Code, and a Prussian tribunal appears by a similar interpretation of similar (perhaps somewhat wider) words in their Code to have included the case of unchastity. There is a remarkable decision on the Roman-Dutch law in the Supreme Court of the Cape of Good Hope, to which Mr. Deane referred me *Horak v. Horak*, Searle, Vol. 3, 389). The facts there were the same as those in the present case, and the court held the marriage void, following, it would seem, the authority of Voet against what Voet admits to be the authority, though he disputes the reasoning, of the canon law. I will only point out that the learned judges feel compelled to repudiate the length to which Voet carries his argument—namely, the annulment of marriage on the ground of unchastity alone, and the language of their judgment recognizes what difficult questions their decision raises and leaves for future solution. Although, however, the question of annulment of marriage by reason of concealed unchastity has been discussed by Scotch text writers, one authority only, Bauhton, appears to have given in his adhesion to the doctrine of Voet as regards ante-nuptial incontinence in a wife, but he courageously overcomes the objection of parity between the sexes by remarking, "A breach of chastity in a man before marriage is not so heinous or scandalous as in a woman; nor is there a presumption that the woman would have refused the man on that ground, though she had known it." Lord Stair, on the other hand, has laid down, "If one married Sempronia supposing her to be a virgin, rich as well nurtured, which were the inductives to his consent, though he be mistaken therein, seeing it is not in the substantials, the contract is valid." See Fraser I. 451. There is no decision, so far as I am aware, of any Scotch tribunal annulling a marriage on the ground either of concealed unchastity or concealed pregnancy, nor has any distinction between the two ever been suggested.

The decisions in the American courts on which the learned counsel for the petitioner places his main reliance do no doubt cover the present case; and the more important of them are, I think, decisions professing to be based on the same principles as we recognize. Speaking with all respect, these courts have, in my opinion, introduced a novelty into the law common to the two countries, and have broken in on the principle that the only

fraud which annuls a marriage is that which renders the mind of one of the parties not a truly consenting mind. They repudiate equally with English tribunals the idea that any other fraudulent representation vitiates a marriage, but they lay down that there is one fraudulent representation, or fraudulent concealment, which renders a marriage void, and that is the representation or concealment by which a woman induces one man to marry her when she is pregnant by another. The leading decision to this effect was given by the Supreme Court of Massachusetts in 1861, *Reynolds v. Reynolds*, 3 Allan, 605, a case decided on demurrer. It is not quite clear whether the chief justice by whom the case was decided conceived himself to be deciding according to the principle of the ecclesiastical law of England, because he was acting under a statute of the State, (Stat. 1855, C. 27, re-enacted by Gen. Stats., C. 107, section 4), which authorized a decree of nullity, "when a marriage is supposed to be void or the validity thereof is doubted either for fraud or any other legal cause," and he stated that "this statute was founded on the assumption that a marriage into which one of the parties was induced to enter through the fraud and deception of the other is null and void, and like other contracts, may be annulled and set aside by the defrauded party." The learned and eminent American text writer, Mr. Bishop, however, considers that this statute was "merely jurisdictional" (Bishop on Marriage, Ed. 1891, Vol. 1, 485), and I think, therefore, that it may be assumed that this enactment was not considered to enlarge the law. The argument of the chief justice, as I understand it, is that fraud vitiates a marriage just as it does other contracts, but that the fraud must be "in the *essentialia* of the marriage relation," and that the fraud of a woman in concealing her pregnancy by a man other than her intended husband at the time of her marriage is such a fraud. It is, he considered, a fraud in the *essentialia* of marriage for two reasons—first, because a child may be born, which, according to the presumption of law, will be the husband's, though not really his; and, secondly, because the woman, at the time of marriage, is incapable of bearing a child to her husband.

The departure, as I venture respectfully to think, from the law of England consists not only in extending the analogy between the law of marriage and the law of other contracts, but more especially in declaring a circumstance to be of the essence of marriage which the English law does not so hold. According to English law, as I have above said, the only material circum-

stance by operating on which fraud vitiates a marriage is the reality of consent. The law of Massachusetts appears to me to add another, not, indeed, the want of chastity in the wife, but such want of chastity as results in pregnancy at the time of the marriage. But are the grounds on which this circumstance is singled out sufficient? The most effective criticism of them appears to me to be supplied by the writer, Mr. Bishop, whom I have above mentioned. He analyzes the judgment in *Reynolds v. Reynolds* with great minuteness, and with regard to both the points above mentioned he gives what appears to me to be conclusive answers. He points out, as to the presumption of paternity, that a man who has evidence to prove the marriage void can prove the child not to be his. It may be added that the birth of the child after makes but little difference, according to English law, in the pecuniary liability of the husband, as 4 and 5 Will. IV., c. 76, section 57, throws on him, at least during his wife's life, the maintenance of her illegitimate children whenever born. As to the incapacity of the woman at the time to become pregnant by her husband, he replies that such incapacity (unlike the sexual incapacity for which the courts annul marriages) is temporary only. He is of opinion, therefore, that the reasoning, when looked at in all its parts, is unsatisfactory. In this opinion I respectfully agree.

It appears to me impossible to say that it is immaterial that a wife has been unchaste and immaterial that she has become pregnant by that unchastity, but it is material if such pregnancy continues till the marriage. I could understand a broad principle that unchastity before marriage should vitiate the contract, as some States of America have, I believe, enacted that it shall, on the ground that a man believes he is making a pure woman his wife. But that is assuredly not the law of England, and unless there is to be one law for a man and another for a woman it is impossible to suppose it ever could be. But I do not understand why the accidental circumstances—first, of misconduct resulting in pregnancy, and, secondly, of that pregnancy continuing to the marriage—should constitute the momentous difference between a valid and invalid marriage. I think I ought, in fairness, to add that, although Mr. Bishop disapproves the judgment of the court of Massachusetts when looked at in its parts, he nevertheless approves of it as a whole. "Though the reasoning," he says (494), when thus examined, step by step, "appears inadequate, few in our American profession will reject

its conclusion. The true view plainly is that here is a cord of several strands, no one of which has any strength to sustain the result when put upon it alone, but duly combined they do sustain it. The effect of combination pervades equally the law of nature and the law of the land. In the latter it is frequently manifest, for example, in conspiracy, both civil and criminal, and it is manifest in every part of the law where there is occasion for its presence." I will only say that metaphor and analogy in legal reasoning are apt to be dangerous guides. The above decision was followed, though under special statutes, in the cases of *Morris v. Morris*, Wright, 630; *Ritter v. Ritter*, 5 Blackford, 81, and *Carris v. Carris*, 9 C. E. Green, 516.

Some of the American courts have, however, felt bound to limit the application of the principle that concealed pregnancy at the time of marriage vitiates it. In *Scroggins v. Scroggins*, 3 Dev. 535, the husband would not swear that he believed his wife chaste at the time of the marriage. Both parties were white. After marriage a mulatto child was born. The marriage was, however, held to be valid on the ground, it would appear, that the husband should have detected his wife's condition. In a later case, *Scott v. Schufelt*, 5 Paige, 43, it appears to have been suggested as the reason for this decision that the woman could not be proved to have deceived her husband, as she might not, at the time of marriage have known whether he or the negro was the father. In *Crehore v. Crehore*, 1 Brown, Mass. 330, and in *Foss v. Foss*, 12 Allen, 26, the wife was pregnant at marriage by a man other than her husband, but the husband had been guilty of antenuptial incontinence with her, and it was held that he was "put on his guard" or "put on inquiry," and so a decree in his favor was refused. On the other hand, in a case in California, *Baker v. Baker*, 13 Cal. 87, it would appear that the decision in *Scroggins v. Scroggins* was disapproved of. I refer to these cases chiefly to show that it has been felt that even the comparatively narrow principle that a marriage is voidable by pregnancy of the wife at the time of it by a man other than her husband must receive still further limitations. I venture to think that such limitations could not stop at the point indicated by the above decisions. What would be said if the husband did not become aware of his wife's pregnancy at marriage for a long time after it, and perhaps after the birth of the legitimate children, as well might happen if a sailor left his wife for a voyage soon after marriage, and before his return there was a miscarriage or the

child died? Could he many years after annul the marriage? It is difficult to see why not if he had no means previously of discovering the truth. Could he bastardize his children? It is also difficult to see why not, unless some further refinement be introduced into the law.

My belief is that to assent to the proposition for which the petitioner contends would be to introduce into a law which now is, and beyond question should be, and be believed to be, certain, a new principle not resting on any sound basis, and develop as it must in several directions, sure to give rise to many doubts and much confusion. To show that this apprehension is not visionary, I venture to quote the experience of the American text-writer to whom I have already referred, expressed in the last edition of his work: Bishop, Vol. 1, 452. Speaking of the subject of fraud in relation to marriage, he writes: "Such judicial utterances upon it as we have are largely conflicting, and otherwise muddled. So that, should an author discussing present all those views, and those only, which have occurred to the judges and found embodiment in their utterances, he would lead his readers into a labyrinth of contradictory and chaotic things, out of which the practitioner could not readily discover a path." I hope that I may be pardoned for declining to take a step which, apparently, leads to such consequences. I have to express my acknowledgments to the learned counsel on both sides for the great aid which their researches have afforded to me. I am sorry for the undeserved misfortune of the petitioner, but the petition must be dismissed.

RETIREMENT OF THE MASTER OF THE ROLLS.

Lord Esher's long judicial career, says the *London Law Journal*, has at length closed. He will be seen at least no more in that branch of the Court of Appeal over which as Master of the Rolls he has presided with so much vigour and geniality, though we may hope that he will still lend his experience to the Privy Council and the House of Lords. At such an event there will be but one sentiment—that of sincere and widespread regret; for his retirement removes from the Bench a great judge, whose unique personality it will be impossible to replace. These are the days of specialists. We have the company lawyer, the Admiralty lawyer, the commercial lawyer, the bankruptcy lawyer; Lord Esher was all these and more in one. He knew Admiralty law

as well as any expert practitioner in Mr. Justice Barnes' Court; as a commercial lawyer he hardly had a rival; he was a match for the Old Bailey advocate in the technicalities of the criminal law or the rules of evidence; in bankruptcy he was as much at home as the judge in bankruptcy himself, and needless to say he was a master of the common law under which he was nurtured. And to this versatility Lord Esher has added a quality without which learning may avail little for the administration of justice; he has been ever "rich in saving common-sense." He once declared that the business of a judge is to find a good legal reason for the conclusions of common-sense, and this dictum is the key to the success of his judicial career. He has never been one of the Pharisees of technicality who think that man was made for the law, and not rather the law for man; he has ever striven to mould the law to meet the exigencies of business and the changes in civil society. His shrewdness, his knowledge of the world, has enabled him to see what justice required, and he has bent all the resources of his fine intellect and his legal learning to do that justice.

This freedom from technicality, this readiness to welcome reforms and loyally carry them out, is the more remarkable and the more honourable when we remember the system and the traditions under which Lord Esher was trained; that his career reaches back to the days when "right and justice and substance," as Lord Russell of Killowen lately said, "were sacrificed to the science of artificial statement," the pseudo-science of special pleading; to the days when *Jarndyce v. Jarndyce* was dragging its weary length along in an unreformed Court of Chancery, and law and equity were on worse terms than Katherine and Petruchio in the early days of their courtship. Called to the Bar more than half a century ago, what a retrospect is his; what kaleidoscopic changes of law and life have passed before his view! Yet through them all Lord Esher has come, not only ripe in experience, but almost unscathed by time. With all his burden of more than eighty years, the Master of the Rolls is still—or was till yesterday—the youngest judge on the Bench, the most light-hearted, and the most popular. Whatever attractions there might be in other Courts, Court of Appeal No. 1 was always full. His genial wit played round all alike—his brothers on the Bench, Attorneys-General, eminent Queen's Counsel, confident juniors—piercing often to the heart of the case; *ridentem dicere verum quid vetat?* But it was "beautifullest sheet-lightning," as

Carlyle says, "never condensed into thunderbolts." Those who were hardest hit never felt the sting rankle, for no venom winged the shaft, as they knew, and kinder heart never beat beneath the ermine. The anecdote which we recently reproduced showed how keenly he could feel for those whom it was his duty judicially to condemn.

Retirement must always be blended with sadness, both for the judge who quits his illustrious post and for those who remain behind to regret him; but it ought to be no slight consolation to the Master of the Rolls to feel, as he may justly feel, in retiring that he has added not a little to the greatness and glory of the noble edifice of English law by his judicial record, and that he carries with him into his well-earned repose the respect, the admiration, and the love of every member of the legal profession.

THE ENGLISH AND UNITED STATES PRACTITIONER.—The writer of an article in the *American Law Review* on "American Lawyers and their Making" says: "As to the relative merits of the English and American practitioner, it is almost impossible to speak. Nothing could be less worthy of praise than the lower type of lawyer in the United States. It is not exacted or expected that he should be a gentleman, a man of education or intelligence, and the safeguards against dishonesty or bad character are almost as slight as against incompetency. A Western chief justice, however, recently said in my hearing that an American lawyer of distinctly secondary rank in this country had, when nearly fifty years of age, been called to the English Bar, and been able thereafter to win, perhaps, the first place at that Bar, if we may judge by the consideration of his fellows or by his fee-book. He referred, of course, to the late Mr. Benjamin. No similar case of an English lawyer winning the first eminence at the American Bar is recalled." The honour of being the most candid critic of the American Bar among the foreigners who have discussed its character is given to Mr. Bryce, who in his "American Commonwealth" writes, "Notwithstanding this laxity, the level of legal attainment is, in some cities, as high or higher than among either the barristers or the solicitors of London. This is due to the extraordinary excellence of many of the law schools. I do not know if there is anything in which America has advanced more beyond the mother country than in the provision she makes for legal education."

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CURRENT TOPICS.

The acceptance by Sir Oliver Mowat, Minister of Justice of Canada, of the office of lieutenant-governor of Ontario, probably brings to a close the active connection of Sir Oliver with the legal profession. His resignation of a seat on the superior bench of Ontario—that of vice-chancellor—was a proceeding not usual in this country, nor in England, though there have been several instances in England of county court judges resigning in order to take other positions. For example, Mr. Kenelm Digby, who has pleaded many Canadian cases before the Judicial Committee of the Privy Council, not long ago resigned his position as judge of a county court, to take an important permanent position in the Department of the Secretary of State. Sir Oliver Mowat held office as judge of the Chancery Division from 14th November, 1864, to 26th October, 1872, when he resigned. His subsequent career as premier of the province fully justified the step, and there can be little doubt that in this position he has been at least as useful to the profession of Ontario and to the public as if he had retained his seat on the bench.

The November term of the Court of Appeal at Montreal was almost a surprise in the amount of work disposed of. Out of 44 cases on the list 32 were heard within eight

days, or, deducting half a day occupied by the delivery of judgments, within seven and one half days. Making due allowance for the time consumed in hearing motions, etc., about one appeal per hour was argued during the term. This rate could hardly be exceeded with proper regard to the interest of the parties, and it is certainly far in advance of the average progress in this Court during the last thirty years. The list of judgments rendered exhibits the unusual fact that there were ten reversals and but one confirmation—a result which is calculated to infuse considerable activity into the business of the Court.

The death of Baron Pollock occurred rather suddenly on November 21st,—the result of a cold by which he was attacked while on the South Eastern Circuit. Sir Charles E. Pollock was born in 1823. He was the fourth son of the late Chief Baron Pollock. He was called to the Bar in 1847, and made a Q. C., in 1866. On the resignation of Baron Channell, in 1873, he was raised to the Bench. He had thus completed twenty-four years' service at the time of his death, and was the senior in length of service after the retirement of Lord Esher. Baron Pollock was "the last of the Barons," and the English Bench now, for the first time in six hundred years, is without an occupant bearing this ancient title. He was also one of the six surviving sergeants-at-law.

A correspondent of the *London Times* directs attention to an important change in United States patent law. By the law relating to grant of patents which has been in force for the last quarter of a century, inventors were permitted to obtain patents at any time during the life of their home or foreign patent provided the invention had not been in public use in the United States for more than two years before their application for patent. A new law, however, will come into force on January 1st, 1898, according to which an inventor is debarred from obtaining a United States patent if he has applied for a patent for

the same invention in any other country more than seven months before he applies for a patent in the United States. Many thousands of patentees have still the right of protecting their inventions in the United States, but they will lose this right when the new law comes into operation.

The long vacation in England is now seriously threatened. A good many persons are for doing away with it altogether, and now the Incorporated Law Society has declared in favour of reducing it to two months, beginning on the first Monday in August, and ending on the last Saturday in September. This change would make it very nearly correspond with the legal vacation in Canada.

QUEEN'S BENCH DIVISION.

LONDON, 27 October, 1897.

Before WRIGHT and KENNEDY, JJ.

DAVIS v. REILLY (32 L.J.)

Promissory note—Delivery of note on account of debt—Note in hands of third party—Action for original debt.

Appeal from the Westminster County Court.

The plaintiff, as trustee in bankruptcy of one Burnley, sued the defendant for goods sold and delivered to the amount of 25*l*. Burnley had supplied the goods to the defendant on the security of a bill for 20*l*., dated October 4, 1896, drawn by him on the defendant, the acceptor, at three months, and subsequently indorsed by Burnley to one Bullock. On January 4, 1897, the bill became due, but was dishonoured. Bullock, as indorsee for value, sued Burnley on the bill, and on January 21 Burnley sued Reilly for the price of the goods. Burnley filed a petition, and a receiving order was made against him on January 30. Bullock proved against Burnley in the bankruptcy on the note, and then handed over the bill to Davis, the trustee, who was appointed trustee on February 22, and who on April 2 applied for a summons for leave to be added as plaintiff in the action of *Burnley v. Reilly*, which leave was granted. The judge gave judgment for

the plaintiff for 25*l*. Against this judgment the defendant appealed.

The Court (Wright, J., and Kennedy, J.) held that it was a good defence at common law to a claim on the original debt to plead that the negotiable instrument given in payment or part payment of that debt was outstanding in the hands of a third party at the commencement of the action, and that there was no rule entitling the plaintiff to amend this defect in the course of the action; but the defect could be cured here by Davis bringing a fresh action, and there was in any case no defence as to 5*l*.

Appeal withdrawn on terms.

LONDON, 3 July, 1897.

Before WRIGHT, J.

HUNT v. HUNT (32 L.J.)

*Husband and wife—Separation deed—Molestation—Covenant against
—Vexatious proceedings.*

Before Wright, J., at Nisi Prius without a jury.

In 1880 the plaintiff had executed a deed of separation with her husband, the defendant, by which they had agreed to live apart, with mutual covenants against molestation by either. In 1896 the defendant went to Texas, and shortly afterwards commenced proceedings for a divorce in the District Court of El Paso on the ground of desertion by his wife previous to the date of the execution of the deed. In pursuance of these proceedings he caused a notice to be served on the plaintiff in England of his statement and of his intention to apply for a commission from the District Court to take the depositions of witnesses in England. The plaintiff brought this action for damages for breach of his covenant against molestation by the defendant, and for an injunction against him or his agents taking any steps in England to carry on the proceedings in the District Court of El Paso.

Wright, J., held that in the case of British subjects who had been married under English law, and subsequently separated under a deed, it was *prima facie* unjustifiable for one party without good cause shown to take proceedings for a divorce in a foreign country, and that under the circumstances here disclosed the defendant's conduct was vexatious, and amounted to a breach of his covenant against molestation.

Judgment for the plaintiff and for an injunction.

COURT OF APPEAL.

LONDON, 24 May, 1897.

Before LORD ESHER, M.R., SMITH, L.J., CHITTY, L.J.

MACAULAY v. POLLEY (32 L.J.)

*Solicitor and client—Authority of solicitor to compromise claim—
Action not commenced.*

Appeal from an order of Grantham, J., at chambers, refusing to stay the action.

The action was brought to recover compensation for personal injuries.

It appeared that the plaintiff, who had sustained personal injuries in respect of which he alleged the defendant was liable to him in damages, whilst lying in a hospital was visited by the clerk to a solicitor. The plaintiff gave the clerk particulars of the accident, and instructed him to act on his behalf in the matter of his injuries. Before any action was commenced, the solicitor agreed with the solicitors to the defendant to take a sum of fifteen guineas in settlement of the plaintiff's claim. This amount, together with a sum of two guineas for costs, was accordingly paid to the solicitor. The plaintiff was not informed of the compromise, and never received any part of the money paid to the solicitor. The plaintiff subsequently commenced the present action.

The defendant applied at chambers for a stay of proceedings upon the ground that the plaintiff's claim had been satisfied. Grantham, J., refused to make the order.

The defendant appealed.

Stephen Lynch, for the defendant, referred to *Chown v. Parratt*, 32 Law J. Rep. C. P. 197, and *Fray v. Vowles*, 28 Law J. Rep. Q. B. 232.

C. E. Jones, for the plaintiff, was not called upon.

Their Lordships, following the decision of Willes, J., in *Duffy v. Hanson*, 16 L.T. (N.S.) 332, held that the solicitor before action brought had no implied authority to compromise the plaintiff's claim, and that, inasmuch as the plaintiff had not in fact authorized the compromise or assented to it, he was not bound by it, and they accordingly dismissed the appeal.

COSTS IN FOREIGN COUNTRIES.

The Society of Comparative Legislation has published an exceptionally interesting contribution to our knowledge of the legal profession outside this country. A commonly received opinion prevails that costs are excessively high in England, and that if actions are carefully and satisfactorily heard, they are more expensive here than abroad. The society has caused detailed inquiries to be made in the principal countries of the world, and the second number of its magazine contains the results of them. Speaking generally, the main result is to show that English practice is not at all widely divided from that of other civilized States. While there is elsewhere nothing so detailed, or, we might add, so ridiculously provocative to the client, as our "bill of costs," except in Germany, where there is a fixed scale of costs depending on the sum recovered, the principles on which legal remuneration is awarded are much the same as here. In summing up the answers received to his inquiries Master Macdonell writes as follows: "On the whole, one is struck by the similarity of the systems of costs described in these reports. The same problems have been considered by foreign courts as by ours; independently, much the same solutions have been adopted; and the same devices have been resorted to to protect clients. The rules as to taxation of costs laid down in French, Italian, Dutch, and Spanish manuals of procedure appear to be substantially the same as those recognized in England. In some form or other the distinction between party and party and solicitor and client costs is recognized in all countries in which costs are allowed to a successful litigant. In most of our colonies the systems of remuneration are much the same as here." It has been found very difficult to compare costs in litigation abroad with those incurred in parallel cases in England, because the procedure is often so different. Roughly, however, litigation involving small sums seems to be dearer here than in France, while for large sums it is cheaper. In the United States lawyers are paid at an altogether higher rate for litigious work, and they often have no other to do. Indeed, from our own experience, we doubt whether Mr. Davies, of the New York Bar, has not under-estimated the usual charges of the most popular of his learned friends. He puts them at about 50*l.* a day, the practice being to charge in that manner. In Germany you can go to law, it seems, for very little. A speci-

men bill in an action for 30*l.* is given. The statement of claim extended to fourteen pages, but it cost only 1*s.* 5*d.* A subsequent "pleading" cost 5*d.*, and another 6½*d.* The total sum was 10*l.* 13*s.*, from which the taxing-master struck off 6*s.*, and this total included and was in great measure made up by the Court fees. Some striking differences from our own practice are disclosed, which at least deserve the attention of legal reformers. The most noticeable is the fact that payment contingent on results is almost universally legal abroad. A change in this direction might abolish much of the uncertainty as to the cost, which makes many men of moderate means dread litigation as the plague.—*Law Journal (London)*.

JOHN WILKES AND THE LIBERTY OF THE PRESS
—*THE WILKES CUP.*

In the year 1772, on the 24th of January, the Court of Common Council of the City of London voted a silver cup to the celebrated patriot, John Wilkes, for his defence of the freedom of the press, and left the design to his own direction. The death of Cæsar in the Roman Senate House was the subject of his choice, being, he said, one of the greatest sacrifices to public liberty recorded in history. The dagger being in the first quarter of the city arms, furnished the hint of

"The dagger wont to pierce the tyrant's breast."—POPE.

Julius Cæsar is represented on the cup as he is described by historians at that important moment, *i.e.*, gracefully covering himself with his toga and falling at the base of the pedestal which supports the statue of Pompey. Brutus, Cassius and other Romans who conspired on behalf of their country, form a circle around the body of Cæsar. Every eye is fixed on Brutus, who is in the attitude of congratulating Cicero on the recovery of the public liberty, and pointing to the prostrate and expiring man. At the bottom of the cup is the following inscription, encircled with myrtle and oak leaves :

" * * * May every tyrant feel
The keen deep searchings of a patriot's steel!"

—CHURCHILL.

On the reverse of the cup is the inscription : "The gift of the City of London to Alderman Wilkes, 1772."

The facts which occasioned the presentation of this cup are very interesting, and were as follows : On the meeting of Parlia-

ment in 1769, some occasional sketches of the proceedings of the House of Commons were printed in the *London Evening Post*, other newspapers in a short time followed the example. On the 12th of February, 1771, Colonel George Onslow, at the instigation of the cabinet, complained that six printers of newspapers had printed parliamentary debates and proceedings. All these persons were ordered to attend the House. Some obeyed the summons, but Miller, the printer of the *London Evening Post*, did not comply with the order. Colonel Onslow having previously declared that he intended to bring before the House every printer who had printed any of the debates or proceedings of Parliament, in order that they might receive the punishment of their contumacy, it was concerted between Wilkes and Mr. Almon, the proprietor of the *London Evening Post*, that if Miller, the printer of that journal, should be sought for, a serious, a bold and a strong resistance should be made. The plan was this: The printer should pay no regard to the order to attend the House of Commons, but if the House sent a messenger to apprehend him Miller was to have a city constable in readiness to take the messenger into custody, that then they were to proceed to the Mansion House, where Mr. Alderman Wilkes, the Lord Mayor (Brass Crosby), and Mr. Alderman Oliver would attend as magistrates. Circumstances happened exactly as had been foreseen. The printer having neglected to attend to the order of the House of Commons, on the 15th of March a messenger of the House came to take him into custody. The printer thereupon gave the messenger in charge to the city constable for an assault, and they all proceeded to the Mansion House. The messenger attempted to justify the arrest of the printer by virtue of the speaker's warrant, but on it being shown that the messenger was not a peace officer, and moreover that the warrant was not backed by a city magistrate, the court, after hearing the case, discharged the printer from the custody of the messenger. The printer in his turn now charged the messenger with a breach of the peace, and was thereupon bound over to prosecute the messenger, who was desired to find bail for his offence. This the messenger refused to do; he was therefore committed to prison (Wood street counter). By this time the deputy serjeant-at-arms arrived from the House and gave the required bail for the prisoner. The ministry and their party in the House of Commons were enraged at this violent resistance to their power. The Lord Mayor and Mr. Alderman Oliver were ordered to attend the House. The clerk to the Lord Mayor was

also ordered to attend with the book containing the entry of the bail found by the messenger.

The Lord Mayor and Mr. Alderman Oliver were committed to the Tower, where they were visited by all the lords and members of the House of Commons, who were in opposition to the ministry, as well as by great numbers of private gentlemen. They also received addresses containing expressions of the highest approbation and of the warmest thanks from every ward in the city of London. The clerk to the Lord Mayor duly attended the House and was ordered to immediately expunge the entry from his book. Wilkes was left alone, for the House feared to arrest him; they had, however, recourse to a prudent subterfuge. They ordered him to attend on the 8th of April, and then moved the adjournment for the Easter vacation until the 9th. The Lord Mayor and Mr. Alderman Oliver were liberated on the 8th of May, the day of the prorogation of Parliament. The city was illuminated in their honor, and every mark of rejoicing was displayed. The corporation of the city of London presented each of the above magistrates with a silver cup, in commemoration of their valuable services in defence of the freedom of the press. The design of the cup which was presented to Mr. Alderman Wilkes, by order of the common council, was as above mentioned.

The struggle between Parliament and the press concerning the printing of debates was not repeated. Parliament seems to have acknowledged that constituents have a right to know the Parliamentary proceedings of their representatives. From that time to the present the debates in both Houses have been constantly printed in all newspapers, and Parliament, as well as the public, has profited by the facility given to the press, and obtained by the city of London in the manner above explained.—*Law Magazine & Review (London)*.

PEERS IN THE COURT OF APPEAL.—The statement made that Lord Ludlow is the only peer (not a Master of the Rolls) who has sat in the Court of Appeal since it has been constituted in its present shape, is quite erroneous. The Lord Chancellor and the late Lord Coleridge, as well as Lord Russell, have frequently presided over the tribunal, and since ex-Lord Chancellors were made *ex-officio* members of it, Lord Herschell has sat in the Court.—*Law Journal*.

DE FACTO CORPORATIONS.

The Supreme Court of Wisconsin has recently rendered a decision (*Bergeron v. Hobbs*, 71 N.W.R., 1056) which raises anew for discussion the question of the sufficiency of technically irregular incorporation as a defence to an action against the would-be incorporators as partners. It appeared that a provision of the Wisconsin statutes, under which the defendants essayed to incorporate the Bayfield Agricultural Association, required the filing of the certificate of organization, with other papers, in the office of a register of deeds. It was held—the court, as it seems to us, adopting a narrow and technical spirit of construction—that a deposit of the papers with the proper register, with instructions to record and return them, was not a sufficient filing to enable the proposed corporation to come into being, and that the defendants were therefore personally liable for claims for labor in improving grounds, and otherwise forwarding the intended corporate enterprise.

It would seem that this decision is contrary to the weight of authority throughout the Union. Judge Marshall, of the Supreme Court of Wisconsin, filed an elaborate and well considered dissenting opinion. The learned dissenting judge formulates as “the true doctrine,” “that it is sufficient to constitute a corporation *de facto*, as against one who has recognized its corporate existence, that there be a law under which it might exist *de jure*, an attempt in good faith to organize under said law, and a subsequent user of the assumed corporate powers.” We understand this statement to be substantially expressive of the general law governing the subject.

A recent case in our own state is *Demarest v. Flack*, 16 Daly, 337; 123 N.Y. 205. The discussion by the New York Court of Appeals in this case was principally directed to the determining that the procuring of incorporation by citizens of this State, under the laws of a sister State, for the purpose of doing business here, is not, as matter of law, “a fraud and an evasion of our own laws and hence in conflict or inconsistent with our domestic policy.”

The conclusion was reached that such a foreign corporation is entitled to recognition in our own tribunals. In the opinion of the General Term of the Court of Common Pleas in the same case the general question of the sufficiency of defective technical organization, so far as outsiders dealing with the intended cor-

poration are concerned, was more specially discussed, with a review of various authorities, State and Federal. In the opinion of the Court of Common Pleas it is remarked :

"There is an overwhelming current of authority throughout the United States on the point that where a corporation has once come into actual existence through the due observance of the original formalities required for that purpose, subsequent omissions or irregularities in the completion of its organization or the prosecution of its business shall not be available as a defence in matters of contract, either to the corporation itself or to its directors or stockholders, and cannot be taken advantage of by outsiders who have had business dealings with it."

The case before the Wisconsin court would seem to be slightly different from *Demarest v. Flack*, because there was a defect in complying with the original formalities. Nevertheless the following language from the dissenting opinion in the Wisconsin case seems to express the substantially just and common-sense position to be taken, fortified, as the court shows, by the authority of many adjudicated cases :

"The very meaning of the term "*de facto*" indicates that nothing more is necessary to the existence of a *de facto* corporation than the exercise of corporate powers in good faith. Corporation *de facto*—that is, a corporation from the fact that it is acting as such under color of right in good faith. The existence of the law, and some attempt to comply with it, are essential, because without them there can be no assumption of the right to corporate existence in good faith. Persons cannot be said to honestly obtain the right to corporate existence, in the absence of any law authorizing the organization, or in the absence of some honest attempt to comply with such law.

The law and such attempt, or user of the franchise, whatever mistakes may be made in so doing—such as the filing of articles of organization when they are required to be recorded, or the recording of articles when they are required to be filed, or the filing of such articles in the wrong office, or any other of the numerous mistakes that might be made—make a corporation good everywhere, in all courts and places, till successfully challenged by the State. There is hardly any end of authority, all in harmony on this subject, but we content ourselves by referring to the following additional cases : *Haas v. Bank*, 41 Neb. 754, 60 N. W. 85; *Lake Church v. Froislie*, 37 Minn. 447, 35 N. W. 260; *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 8 South. 658;

Stout v. Zulick, 48 N. J. Law, 601, 7. Atl. 362; *McCarthy v. Lavasche*, 89 Ill. 270; *Hudson v. Seminary Corp.*, 113 Ill. 618; *City of St. Louis v. Shields*, 62 Mo. 247; *Central A. & M. Association v. Alabama Gold L. Ins. Co.*, 70 Ala. 120; *Palmer v. Lawrence*, 3 Sandf. 161; *North v. State*, 107 Ind. 356, 8 N.E. 159."—*N. Y. Law Journal*.

MR. JUSTICE CHANNELL.

Mr. Arthur Moseley Channell, Q.C., has been appointed to be one of the Justices of the High Court in the place of Mr. Justice Vaughan Williams, appointed a Lord Justice of Appeal. Mr. Channell, who was born in London in 1838, is the only surviving son of the late Baron Channell, who was a distinguished member of the Court of Exchequer. His scholastic career was scarcely less successful than his professional career has been. He was educated at Harrow, where Sir Francis Jeune, Sir George Trevelyan, and Mr. Kenelm Digby were among his contemporaries. He defeated Sir George Trevelyan in the race for the position of "top" of the school, and, gaining a foundation scholarship, proceeded to Trinity College, Cambridge, where he graduated as twenty-sixth wrangler and was placed in the second class in the classical tripos of 1861. His reputation at the university was based quite as much upon his prowess as an oarsman as upon his success as a scholar. He won the Colquhoun Sculls in 1860, and the University Pairs in 1861, and rowed in the first Trinity boat which won the Grand Challenge Cup and the Ladies' Plate at Henley in 1861. He was called to the Bar at the Inner Temple in 1863, and read with Pownall, a well-known conveyancer, and Edward Bullen, the famous special pleader. In the early part of his career, until the practice he acquired in London and on the South-Eastern Circuit justified him in abandoning the favourite method of acquiring experience in forensic work, he devilled for Chief Justice Bovill, Mr. Justice Day, and Mr. Murphy, Q.C. He was made a Queen's Counsel in 1885, and three years later was appointed Recorder of Rochester. During the past two years he has occupied the position of vice-chairman of the Council of the Bar—a fact which affords ample evidence of the esteem in which he is held by the profession. He has never taken any active part in politics, and this is certainly not the least welcome feature of his appointment to the Bench. His leisure is devoted to yachting.—*Law Journal (London)*.

GENERAL NOTES.

AUTHORITY OF REPORTS.—Considering how largely English law rests on the authority of decided cases, it is rather surprising how little trouble is taken to appraise the value of the different series of our vast range of reports. When Mr. Preston cited a case from the "Chancery Cases of Barnardiston," Lord Lyndhurst exclaimed, "Barnardiston, Mr. Preston! I fear that is a book of no great authority. I recollect in my younger days it was said of Barnardiston that he was accustomed to slumber over his note-book, and the wags in the rear took the opportunity of scribbling nonsense in it." So when Espinasse was cited to the late Chief Baron Pollock, that learned judge is reported to have said, "Espinasse! let me see; wasn't that the deaf old reporter who heard one half the case and reported the other?" "Fitzgibbon's Reports" (1728-33) came in for some scathing remarks from Lord Raymond. That learned judge described them as a libel upon the Bar and the Bench, and said that they had made the judges, and particularly himself, talk nonsense by wholesale. "See the inconvenience of these reports! They will make us appear to posterity for a parcel of blockheads." Yet these, and many others of indifferent authority, are cited indiscriminately, under stress of argument, in our Courts every day. Why does not the Bar Council publish a canonical list of books, reports, and text books sanctioned by the judges? In old days, many of the series of reports were licensed by the judges. It is only fair to say, however, *apropos* of Lord Raymond's strictures on "Fitzgibbon's Reports," that Sir James Burrows observes: "I have examined all the King's Bench cases in them very carefully, and have compared them with my own notes, and find him to have made the judges talk almost verbatim what I took down myself from their own mouths." But is not this quite compatible with Lord Raymond's wrath? Could even a Solomon stand being reported verbatim?—*Law Journal* (London).

INFLUENCE OF THE OATH.—People know little of human nature who think that the solemnity of an oath might be dispensed with on the part of witnesses in a Court of justice—that the conscientious man may be trusted to tell the truth because "right is right," and that for the unconscientious an oath is an idle form. These theorists do not reckon with the superstitious beliefs which thousands of years have wrought into the very soul of man, into the web and warp of his consciousness; dor-

mant but quickly awakening into vivid life—beliefs which recognize in the oath a real appeal to Heaven and darkly dread a swift-avenging Nemesis on the forsworn. The system of ordeal on which for 200 years our law rested for its sanction is a marvellous testimony to the living, unabated force of such superstition—strong because it is the shadow of a truth. The particular forms of oath which will appeal to such superstitious sentiment are, as we know, various. The Chinaman prays that if he forswears himself his soul may be cracked as the sancer which is broken in Court is cracked. Quite recently a Buddhist was sworn, and the form which the interpreter informed the Court he respected was the extinguishing of a candle—a wax vesta, it seems, would not do—and he prayed that if he did not speak the truth “his soul might be blown away in the same way as was the light.” This is interesting not only to the lawyer, but to the philosopher, and for this reason: Buddhists are usually credited with aspiring to Nirvana in the next world—a state of ecstatic annihilation. The soul is supposed to be absorbed into the infinite as a drop of water melts into the ocean. The above form of oath is at variance with such a view. It points to a belief in the individuality of the soul after death.—*Ib.*

THE MEDIEVAL MARKET.—In reading the history of English law, one of the things which strike us most is the continuity of legal ideas, of legal institutions. Market overt, for instance, still invests a contract for the sale of goods with a special sanctity. In Professor Maitland's “Domesday Book and Beyond” we see the germ idea of this, get a glimpse of the growth of the mediæval market. Early law, it must be remembered, does not allow men to buy and sell everywhere. It would simplify too much the disposal of stolen goods—of cattle, for instance, by the cattle-lifter. The law establishes a market, and a person who buys elsewhere runs a risk of being treated as a thief if he happens to buy stolen goods. But where does the market establish itself? The answer is, in the king's burh—the fortified hilltop, the nucleus of the later borough—because a special peace spreads around it for a space specified with curious minuteness of “3 miles, 3 furlongs, 3 acrebreadths, 9 feet, 9 handbreadths, 9 barleycorns.” Anyone who broke the king's burh or was guilty of unlawful violence within the king's peace must pay a heavy fine; he might lose his hand if he drew a sword. Here, then, was the sanctuary of trade, an oasis of industrialism where men

might come and go safe under royal protection. On market days this "peace" was intensified. But the "peace" was not altogether a royal bounty. The king took care to get his tolls, and a very profitable source of revenue this became as trade prospered. The disputes of the market-place also furnished abundant litigation for the borough Court, and here, again, the king made his profits. —*Law Journal (London)*.

CHRISTIANITY AND THE LAW.—Christianity, we have often heard, is part of the common law of England, but Chief Justice Best was committing himself to a very bold proposition when he said in *Bird v. Holbrook* that there is no act which Christianity forbids that the law will not reach. True it is that neither the law nor Christianity will allow shipwrecked mariners, for instance, to eat a boy companion in order to save their lives; but the law does allow one shipwrecked mariner who is clinging to a spar to push another off if the spar will not suffice to support both, which certainly Christianity does not. The law, in fact, allows what, for want of a better word, we may call legitimate selfishness. It commends the higher standard of Christianity, but does not exact it. The particular instance which Chief Justice Best had in his mind was the inhumanity of setting spring guns without notice. And it is one which very well illustrates the Christian attitude of our law. The law allows a man to be vigorous in the protection of his property, but not vindictive. He could (at one time) set spring guns in his grounds with due warning, as he still may at night in his dwelling-house; saying, in effect, to trespassers, "If you come here, take the consequences." Then the trespasser coming to the danger is the author of his own wrong. This is logical. But he must not set a secret and fatal snare, as the defendant in *Bird v. Holbrook* did. A trespasser is not to pay for his trespass with his life unless he chooses to run the risk. If he does, 'volenti non fit injuria.'—*Ib.*

RAILWAY PUNCTUALITY.—Questions are continually raised as to whether persons aggrieved by the failure of railway companies to run their trains punctually according to the advertised times have any legal remedy. The conditions of the contract of carriage incorporated by reference on tickets to the published time-tables &c. of the company, where ambiguous, will be read against the company. In the earlier decisions on the subject the Courts were disposed to treat the conditions as creating a contract to insure punctuality as far as practicable, and *Le Blanche v. The*

London and North-Western Railway Company, L.R. 1 C. P. Div. 286, 313, held that a person who was delayed by unpunctuality was entitled to take a special train and charge the cost as damages. But the companies can refuse to guarantee punctuality and their present conditions are to this effect, with the result that the passenger is really without remedy (*Lockyer v. The International Sleeping Car Company*, 61 Law J. Rep. Q.B. 501; *McCartan v. The North-Eastern Railway Company*, 54 Law J. Rep. Q.B. 441). The result of these decisions appears to be that the tables are a mere representation as to the time *before* which a train will not start from or arrive at a particular station, but that there is no promise or contract to start or arrive *at* the times specified.—*Law Journal (London)*.

AN ENGLISH Q.C. CALLED TO THE IRISH BAR.—The *London Times* says:—"Amongst the calls to the Bar at Dublin was one of exceptional interest—namely, that of Sir Alexander Edward Miller, Q.C., of Lincoln's Inn, who appeared in a stuff gown, wearing on his left breast the medal of a Companion of the Order of the Star of India. His presence recalled the circumstances of the eventful contest for the representation of the University of Dublin, in which he came forward as the accredited candidate of the Conservative Government in 1875, and was opposed by Mr. Edward Gibson, Q.C., the Lord Chancellor, before whom he appeared seeking admission to the Irish Bar. It is the first instance of the kind which has ever occurred. Sir A. Miller has close ties of family and property with the North of Ireland and was for years an active member of the general synod of the Church of Ireland. He is a graduate of the University of Dublin, an LL.D., and member of the Senate. He was proposed by the Lord Chief Baron."

COUNTY COURT BUSINESS IN ENGLAND.—The character of the present work of the County Courts does not warrant any very great change in their constitution. Of 1,081,867 plaints entered in 1895, no fewer than 1,068,908 were for amounts not exceeding 20*l*. These figures show that the County Court, though possessing higher powers, continues to have for its chief business the collection of small debts.

JUDICIAL ANGLERS.—Three of the present Lords Justices—Lords Justices Smith, Rigby, and Collins—are all distinguished Cambridge men. All three are also anglers, and find the chief pleasure of their vacations in the catching of salmon.

THE LEGAL NEWS.

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AN EDITORIAL ANNOUNCEMENT.

With the present number "The Legal News" completes its twentieth year, and the editor's connection with it comes to an end. As to the reasons for this step it is sufficient to say that the increasing pressure of other engagements has made it difficult for the writer to give adequate attention to his labors as a journalist, and he has long felt the need of some relief. The publishers are not in a position at present to make any definite announcement as to the future of the journal, but it may be continued under other management, in whose hands we trust that it will have a long and prosperous existence.

Twenty years, however long in the prospect, are but a brief span in the retrospect. Still, twenty years form no inconsiderable period in legal chronology. It is a period longer than the ordinary term of judicial service. It is more than half the average span of the lawyer's professional life. It is one-third of the long Victorian reign, and more than one-seventh of the time which has elapsed since the cession of Canada.

What changes have occurred in our own part of the Dominion during this period! Four Chief Justices, Sir Antoine Dorion, Sir Francis Johnson, Sir William Mere-

dith and Sir Andrew Stuart, have passed away. Not a single member of the Court of Appeal survives, and but five members of the Superior Court for the Province of Quebec, as constituted twenty years ago, are now on the bench. They are, Chief Justice Casault, Justices Routhier, Bélanger, Caron and Bourgeois. In the ranks of the bar the change is equally great. The elders of twenty years ago have for the most part disappeared from the arena; the rising men of twenty years ago are growing elderly; and pressing close behind them is a host of young men who were then in the school-room. It is not our purpose, however, to indulge in melancholy reminiscences on the present occasion. We shall only add that our work in connection with this journal has always been a great pleasure to us, and we desire to express our gratitude to the many friends who have aided us from the beginning.

The case of *Cusson v. Delorme* illustrates the law's uncertainty. By the original decision of Mr. Justice Archibald (Q. R., 10 S. C. 329) the action was dismissed. Then the Court of Appeal reversed this judgment and maintained the action (Q. R., 6 Q. B. 202.) The latter judgment has now been reversed by the Supreme Court. The actual value of the land in dispute probably was less than forty dollars.

The Judicial Committee of the Privy Council has given the decision which was virtually announced at the hearing of the question, viz., that the provincial governments have the right to appoint Queen's Counsel with precedence in the local or provincial courts. The judgment does not interfere with the Dominion right of appointment. The undue augmentation of the ranks of Queen's Counsel which will probably follow this decision is an inconvenience of our constitutional system which does not appear to have been foreseen, and which must be accepted, unless the title should be dispensed with altogether.

SUPREME COURT OF CANADA.

OTTAWA, 10 November, 1897.

Nova Scotia.]

KNOCK v. KNOCK.

Easement—Winter road—Appurtenant way—Necessary way—Implied grant—Landlocked tenement—User—Evidence of—Prescription—Discontinuous user—Contentious user—Obstruction of way—Interruption of prescription—Acquiescence—Limitation of action—R. S. N. S. (5 ser.) c. 112—R. S. N. S. (4 ser.) c. 100—2 & 3 Wm. IV. (Imp.) c. 71, s. 2 & 3.

K. owned lands in the county of Lunenburg, N.S., over which he had for years utilized a roadway for convenient purposes. After his death the defendant became owner of the middle portion, the parcels at either end passing to the plaintiff, who continued to use the old roadway, as a winter road, for hauling fuel from his wood-lot to his residence, at the other end of the property. It appeared that though the three parcels fronted upon a public highway, this was the only practical means plaintiff had for the hauling of his winter fuel, owing to a dangerous hill that prevented him getting it off the wood-lot to the highway. There did not appear to be any defined form of the way across the lands more than a track upon the snow, during the winter months, and it was not utilized at any other season of the year. This user was enjoyed for over twenty years prior to 1891, when it appeared to have been first disputed, but from that time the way was obstructed from time to time up to March, 1894, when the defendant built a fence across it that was allowed to remain undisturbed and caused a cessation of the actual enjoyment of the way during the fifteen months immediately preceding the commencement of the action in assertion of the right to the easement by the plaintiff.

The statute (R. S. N. S. 5 ser. ch. 112) provides a limitation of 20 years for the acquisition of easements, and declares that no act shall be deemed an interruption of actual enjoyment, unless submitted to or acquiesced in for one year after notice thereof and of the person making the same.

Held, that notwithstanding the customary use of the way as a winter road only, the cessation of user for the year immediately preceding the commencement of the action was a bar to the plaintiff's claim under the statute.

Held also, that the circumstances under which the roadway had been used did not supply sufficient reason to infer that the way was a necessary easement appurtenant or appendant to the lands formerly held in unity of possession, which would pass by implication upon the severance of the tenements, without special grant.

Appeal allowed with costs.

Wade, Q.C., for appellant.

Harrington, Q.C., for respondent.

Coram GIBOUARD, J.

31 December, 1896.

EX PARTE MACDONALD.

Habeas corpus—Jurisdiction—Form of commitment—Territorial division—Judicial notice—R. S. C. c. 135, s. 32.

A warrant of commitment was made by the stipendiary magistrate for the police division of the municipality of the county of Pictou, in Nova Scotia, upon a conviction for an offence therein stated to have been committed "at Hopewell, in the county of Pictou." The county of Pictou appeared to be of a greater extent than the municipality of the county of Pictou, there being also four incorporated towns within the county limits, and it did not specifically appear upon the face of the warrant that the place where the offence had been committed was within the municipality of the county of Pictou. The Nova Scotia statute of 1895 respecting county corporations (58 Vict. ch. 3, s. 8) contains a schedule which mentions Hopewell as a polling district in Pictou county entitled to return two councillors to the county council.

Held, that the court was bound to take judicial notice of the territorial divisions declared by the statute as establishing that the place of the offence mentioned was within the territorial extent of the police division.

Held also, that the jurisdiction of a judge of the Supreme Court of Canada in matters of *habeas corpus* in criminal cases is limited to an inquiry into the cause of imprisonment as disclosed by the warrant of commitment.

HISTORIC COLLISIONS BETWEEN BENCH AND BAR.

"Good feeling," says Mr. Oswald in his work on "Contempt of Court," "nearly always exists between the bench and bar, and when it is interrupted the reason for it may generally be found to exist on both sides. There is scarcely any instance upon record in the superior courts of a conflict between the bench and bar becoming so acute as to lead to the committal of an advocate for contempt while conducting his client's cause. Even Chief Justice Jeffreys (who is said to have browbeaten and sometimes threatened counsel) does not appear to have put in force the power of committal against counsel. And during the progress of the once celebrated *Reg v. Castro*, or Tichborne case (which in its hearing occupied the time of the court for a longer period than any other trial on record, except that of Warren Hastings), although there were frequent conflicts between bench and the advocate for the "claimant," and several reminders to him by the judges of the weapon with which the law armed them, the court never went to the length of depriving the client of the services of his advocate. The natural disinclination of the court to interfere with counsel in such a way as to take his services from his client ought to form a strong reason for counsel not assuming too great a license." This passage may be taken as a good, short exposition of the true position, and of a correct appreciation of what the proper relations should be.

It is difficult to find a clear case of a barrister being punished for contempt while actually pleading for his client in court. *Re Pater* is, however, such a case (12 W.R. 823). Of two other cases cited by Mr. Oswald, where both persons committed were litigants, and apparently solicitors, *Carus Wilson's case* (7 Q.B. 984) may be, for the present purposes, worth looking at; in the other (*Reg. v. Jordan*, 36 W.R. 589), Mr. Justice Cave said that the observation, "That is a most unjust remark," however said, is a gross insult to any court of justice, and if not withdrawn amounts to a contempt. *Re Pater* does not help us much. Mr. Pater, a barrister practising at the Middlesex Sessions in 1864, feeling himself aggrieved by certain interruptions on the part of the foreman of the jury, remarked in his speech for the defence, "I thank God there is more than one juryman to determine whether the prisoner stole the property, for, if there were only one, and that one the foreman, from what has transpired to-day, there is no doubt what the result would be." For this he was ultimately fined £20. On appeal to the Queen's Bench Chief

Justice Cockburn said: "It appeared that Mr. Pater was fined for certain words uttered in his address to the jury, and I quite agree with Mr. Pater's counsel (Denman, Q. C., McMahon, and Kenealy) that the words in themselves are words which any counsel might have uttered in the honest discharge of his duty, and if they had been so uttered, though they might have been harsh and unpleasant to the party affected, that could not have been construed into contempt. But, on the other hand, if, though used in the course of his address to the jury, they were not used for the purpose of inducing the jury to come to a conclusion in favor of his client, but for the purpose of wantonly insulting one of the jurors, then I say they are an abuse of the privilege of counsel, and properly punishable as contempt of court."

The court refused any relief. It will be noticed here that the contempt was not for words uttered to the bench, but the deputy assistant judge stated in his affidavit that, on his imposing the fine, Mr. Pater said:—"This shall not rest here. I will bring the subject under the notice of Sir George Grey, and very probably your removal from the bench will be the result." With other instances of barristers punished (by fine or commitment) for contempt on grounds totally different to those in question, there is no need to deal here.

There are some historic precedents of impassioned dialogue between the representatives of the two orders. To begin with, there is the classic story of Wedderburn in 1757. Lockhart, being against him in the Inner House at Edinburgh, showed "even more than his wonted rudeness, and superciliousness," and called him "a presumptuous boy." "When," says Campbell (Life of Lord Loughborough in the Chancellors, vol. 6, p. 47), "the presumptuous boy came to reply, he delivered such a furious personal invective as never was before or since heard at the Scottish bar." Wedderburn's language, reported by Campbell, was an outrage on decency. Lord President Craigie, being afterwards asked why he had not sooner interfered, answered, "Because Wedderburn made all the flesh creep on my bones." But at last his Lordship declared in a firm tone that "this was language unbecoming an advocate and unbecoming a gentleman." Wedderburn, now in a state of such excitement as to have lost all sense of decorum and propriety, exclaimed that "his Lordship had said as a judge what he could not justify as a gentleman." The president appealed to his brethren as to what was fit to be done, who unanimously resolved that Mr. Wedderburn should

retract his words and make a humble apology, on pain of deprivation. All of a sudden, Wedderburn seemed to have subdued his passion, and put on an air of deliberate coolness, when, instead of the expected retraction and apology, he stripped off his gown, and, holding it in his hands before the judges, he said: "My Lords, I neither retract nor apologize; but I will save you the trouble of deprivation; there is my gown, and I will never wear it more—*virtute me involvo*." He then coolly laid his gown upon the bar, made a bow to the judges, and, before they had recovered from their amazement, he left the court, which he never again entered."

Another Scotchman, who also rose to be Lord Chancellor of England, played a nobler part in his contention with the bench. In 1784 the Dean of St. Asaph was indicted at Shrewsbury for seditious libel, and he was defended by Thomas Erskine. The jury found him "Guilty of publishing only." Buller, J.: "If you find him guilty of publishing, you must not say the word 'only.'" Erskine: "By that they mean to find there was no sedition." Juror: "We only find him guilty of publishing. We do not find anything else." E.: "I beg your Lordship's pardon, and with great submission. I am sure I mean nothing that is irregular. I understand they say, 'We only find him guilty of publishing.'" Juror: "Certainly, that is all we do find." B.: "If you only attend to what is said, there is no question or doubt." E.: "Gentlemen, I desire to know whether you mean the word 'only' to stand in your verdict." Jurymen: "Certainly." B.: Gentlemen, if you add the word 'only' it will be negating the innuendoes." E.: "I desire your Lordship, sitting here as judge, to record the verdict as given by the jury." B.: "You say he is guilty of publishing the pamphlet, and that the meaning of the innuendoes is as stated in the indictment." Juror: "Certainly." E.: "Is the word 'only' to stand part of the verdict?" Juror: "Certainly." E.: "Then I insist it shall be recorded." B.: "Then the verdict must be misunderstood; let me understand the jury." E.: "The jury do understand their verdict." B.: "Sir, I will not be interrupted." E.: "I stand here as an advocate for a brother citizen, and I desire that the word 'only' may be recorded." B.: "Sit down, sir, remember your duty, or I shall be obliged to proceed in another manner." E.: "Your Lordship may proceed in what manner you think fit; I know my duty, as well as your Lordship knows yours. I shall not alter my conduct." (Campbell, *Ibid*, p. 432).

The verdict was finally entered "Guilty of publishing, but whether a libel or not we do not find."

Valuable as this precedent is, the comment of Campbell, himself a judge and Lord Chancellor, is equally precious: "The learned judge took no notice of this reply, and, quailing under the rebuke of his pupil, did not repeat the menace of commitment. This noble stand for the independence of the bar would of itself have entitled Erskine to the statue which the profession affectionately erected to his memory in Lincoln's Inn Hall. We are to admire the decency and propriety of his demeanor, during the struggle, no less than its spirit, and the felicitous precision with which he meted out the requisite and justifiable portion of defiance. The example has had a salutary effect in illustrating and establishing the relative duties of judge and advocate in England."

Another hot forensic *mêlée* is recorded about 1817 (2 Law and Lawyers, 357). Serjeant Taddy was examining a witness in the Common Pleas, and spoke of the plaintiff "disappearing" from the neighbourhood. Park, J.: "That's a very improper question, and ought not to have been asked." T.: "That is an imputation to which I will not submit. I am incapable of putting an improper question to a witness." P. (angrily): "What imputation, sir? I desire that you will not charge me with casting imputations. I say that the question was not properly put, for the expression "disappear" means "to leave clandestinely." T.: "I say that it means no such thing." P.: "I hope that I have some understanding left, and, as far as that goes, the word certainly bore that interpretation, and therefore was improper." T.: "I never will submit to a rebuke of this kind." P.: "That is a very improper manner for a counsel to address the court in." T.: "And that is a very improper manner for a judge to address a counsel in." P. (rising very warmly): "I protest, sir, you will compel me to do what is disagreeable to me." T. "Do what you like, my Lord." P. (sitting down): "Well, I hope I shall manifest the indulgence of a Christian judge." P.: "You may exercise your indulgence or your power in any way your Lordship's discretion may suggest, and it is a matter of perfect indifference to me." P.: "I have the functions of a judge to discharge, and in doing so I must not be reprov'd in this sort of way." T.: "And I have a duty to discharge as counsel which I shall discharge as I think proper, without submitting to a rebuke from any quarter." Serjeant Lens was about to interfere. Taddy protested against any inter-

ference, but Lens said, "My brother Taddy, my Lord, has been betrayed into some warmth. "I protest," said Taddy; "I am quite prepared to answer for my own conduct." P.: "My brother Lens, sir, has a right to be heard." T.: "Not on my account; I am fully capable of answering for myself." P.: "Has he not a right to possess the court on any subject he pleases?" T.: "Not while I am in possession of it, and am examining a witness." "Mr. Justice Park then, seeing evidently that the altercation could not be advisably prolonged, threw himself back into his chair, and was silent."

Lord Brougham mentions a strange scene, of which he was witness, amusing rather than of good example. At Durham (about 1810) a cause was being tried before Baron Wood. "There was heard an undergrowl on the other side from the Serjeant (Cockell), abusing Topping for his insolence and ingratitude, and the Baron for his ignorance and partiality, and calling for his clerk to bring him some of the stomach tincture, which he knew would console him, as it was generally brandy with some water added, to give it a name rather than materially alter its nature." (Works, vol. 4, p. 384).

Something has been said about Kenealy's case above. As a matter of fact, his utterances in court never formed the subject of inquiry by any professional tribunal, but the important point to notice is that it was his Inn, Gray's, which set the Lord Chancellor in motion (on account of his editorship of the *Englishman*), with the result that he was dispatented, and which disbenched and disbarred him on the same ground.

It will be clear from all the instances that no formula can exactly define to what length of retort or freedom of speech in addressing a judge counsel may with propriety—as to safety, there is practically no question)—go. Obviously, a genuine instinct of self-respect will inspire an advocate with the exact measure of what is due to himself and what is due to his professional superior, just as it will antagonists in any other controversy. This is what Campbell called in Erskine, "The felicitous precision with which he meted out the requisite and justifiable portion of defiance." Without that instinct it matters little at the bar, or anywhere else, on which side the merits of the dispute are; it cannot be conducted in a seemly way by him that lacks it.

Perhaps the true "rule" may be collected from a dictum attributed to Curran *arguendo*. He offended Judge Robinson, who exclaimed furiously, "Sir, you are forgetting the respect

that you owe to the dignity of the judicial character." "Dignity? my Lord," said Curran. "Upon that point I shall cite you a case from a book of some authority with which you are perhaps not unacquainted. "A poor Scotchman, upon his arrival in London, thinking himself insulted by a stranger and imagining that he was the stronger man, resolved to resent the affront, and taking off his coat, delivered it to a by-stander to hold. But having lost the battle he turned to resume his garment, when he discovered that he had unfortunately lost that also—that the trustee of his habiliments had decamped during the affray." So, my Lord, when the person who is invested with the dignity of the judgment-seat lays it aside for a moment to enter into a disgraceful personal contest, it is in vain, when he has been worsted in the encounter, that he seeks to resume it—it is in vain that he endeavors to shelter himself behind an authority which he has abandoned." Robinson exclaimed, "If you say another word, I'll commit you." "Then, my Lord, it will be the best thing you'll have committed this year." The judge did not do as he threatened, any more than was done in any of the cases already mentioned, or indeed in any recorded; but it is instructive to read that "He applied to his brethren to unfrock the daring advocate," but they refused. The true principle may be adduced from Curran's apologue. So long as a judge speaks in that capacity be he right or wrong, he is entitled to all respect of demeanor and all courtesy of language. The moment he descends to personalities, invective or criticism not warranted or required by his duty to the court, that is, to the public, he strips himself of his judicial function, and the person aggrieved by his language is entitled to speak to him as man to man, a relation which, of course, still includes that of gentleman to gentleman.

In such a competition the judge, of course, starts with everything in his favor; if he is worsted, or reduced to silence, it must be his own fault. That some judges have succeeded in being severe without being insulting, may be seen from Roger North's account of his brother, the chief justice (about 1675). "There were yet some occasions of his justice, whereupon he thought it necessary to reprehend sharply. As when counsel pretended solemnly to impose nonsense upon him, and when he had dealt with them and yet they persisted—this was what he could not bear—and if he used them ill, it was what became him, and what they deserved. And then his words made deep scratches; but still with salve to his own dignity, which he never exposed by impotent chiding.—*The Law Times (London)*.

FAREWELL WORDS OF AN EMINENT JUDGE.

On Nov. 15, there was a large attendance of the Bench and Bar in the Lord Chief Justice's Court, when Lord Esher, the ex-Master of the Rolls, took leave of the Bar.

The Attorney-General addressed Lord Esher as follows, all the members of the Bar standing: My Lord Esher,—Your lordship has been good enough to be present here to-day in order that I, on behalf of the profession of which you have been for so many years a distinguished ornament, might bid you a few words of farewell. My lord, recognizing in you another of those distinguished advocates who trace no small part of their success to the fact that they joined the great Northern Circuit, I doubt not that you owe some of your keen appreciation of clear and incisive argument to the fact that you had among your competitors and rivals such men as Edward James, Stephen Temple, and George Mellish, and some of us who were privileged to practise in the old Court of Admiralty remember well the distinguished position you attained there when Dr. Lushington was its judge, a position which has made its mark on many judgments delivered during the last twenty years. But, my lord, interesting to you and to us as may be references to your lordship's career at the Bar, it is upon your lordship's position as a judge that I desire for a few moments to dwell. When, my lord, in 1868 you relinquished the high position of Solicitor-General to become one of the judges of the old Court of Common Pleas, there were not a few who thought that you had somewhat abruptly terminated what might have been a great parliamentary or forensic career. But, my lord, a few months were sufficient to satisfy all that in undertaking the great responsibilities of a judge you were accepting the duties of an office which you were well qualified to fulfil. My lord, many of us remember the great commercial years of prosperity and the Guildhall Sittings unshorn of any of their ancient glory, and can remember the trial of many causes in which your lordship's business knowledge and acquaintance with commercial affairs came out in strong relief. My lord, your lordship's translation to the Court of Appeal in 1876, and your lordship's selection as Master of the Rolls, following one of the quickest thinkers who has ever adorned the English Bench, are steps in your career which met with universal approval and approbation. I pause not to consider whether the twenty-nine years during which your lordship has occupied high judicial position is without precedent, but this I say, without fear of criticism, that from the day when your lordship first sat upon the Bench until the day of your retirement your career has been one of continuous and increasing success. Your lordship made your Court a tribunal for business men in which mercantile usages and mercantile customs were grasped and appreciated, and while, my lord, you endeavored to bring to bear to the case which you had to decide all the legal knowledge at your disposal, you never permitted any legal technicalities to interfere with what you believed to be substantial justice. My lord, we at the Bar have

winned at times under the searching criticisms of our arguments—criticisms which led us to stand up, as your lordship would have wished us to stand up, against the interlocutory comments, for the moment perhaps adverse to the views which we were expressing on behalf of our clients. But your lordship's comments left no sting behind, and on reflection we felt that your great object was first to ascertain the facts, and then to endeavor to see that justice should be done. My lord, I have but one more word to say. There is one feeling to which expression must be given, and that is the conviction which has rested in the hearts of every member of the Bar of your constant and unswerving loyalty to our profession. My lord, though you were far above us, you still wished to be one of us; you respected our wants and our aspirations; you have shared our joys and our sorrows. My lord, it is this feeling which made it impossible that you should be allowed to retire in silence; it is this feeling which will link you with us in the future as it has in the past; it is this feeling which will make you carry with you a wealth of good wishes of far more value than any feeble words in which I have expressed them; it is this feeling which makes it so difficult for me to say the word which can scarcely be uttered by friends—I mean, farewell.

Lord Esher replied: My dear Attorney-General, and all of you here, I have had some difficulty in coming to a determination as to the character in which I was to address you. I am no longer a judge, and I hardly, for a time, was able to determine what I am. I am still one of you, as I think. I am a serjeant-at-law. I am a barrister of more than ten years' standing. I am capable of being appointed a County Court judge, or to sit as a commissioner to hold an assize. I am therefore now what I have always tried to be, and what I have always tried to make you feel that I was during the whole time I was a judge—namely, one of you, and only one of your equals. It is true that on the Bench, when I was in the position of an officer on the quarter-deck, I had and was obliged to give occasionally words of command; but the moment one leaves the deck one is nothing but a fellow-officer, and I have been nothing but a fellow-barrister with you always. It is in that character, therefore, that I desire to speak to you to-day. Now, next came to my mind what should be the tone which I should adopt—Shall it be the tone of sadness as of a last dying speech and confession, or shall I say that which I feel—that I am as happy as a man can feel under the circumstances in which I now am? I have been a judge assisted by you all, by most of you who are here present, by almost all the profession, for twenty-nine years and some months. I believe myself it is the longest period ever known during which a judge has sat on the Bench as a judge. I believe so, but I am not quite sure. I have ceased to be a judge, and the Queen has given me an unusual mark of approval, and that mark and your presence here to-day, and saying what you have said, have made me not only happy, but as happy as a man can possibly be. You have mentioned

the mode in which, or the circumstances under which I became a judge. Well, all I will say to all of you is this—I became a judge because I had made up my mind and will from the beginning that I would be a judge. But do not suppose that I had no checks, and that there were not occasionally times when I thought that I was what people call “passed over,” which never really exists, as there is nothing to pass over because we are all equals; but what I said to myself was, “Never mind, this is a check, but I will go on and I will get to the top if it is possible to do so.” I recommend that to you all. There is another circumstance which I hope exists with many of you—that whenever there came a check, or whenever there came a difficulty, I had one by my side who assisted me with affection and with wise counsel, and who is the principal cause of my success in life. On this happy occasion, then, let me speak, not sadly, but with joy. I retire, not because I think I am totally unable now to continue to act as a judge—I think I could go on a little longer—but I thought it right, considering the age to which I have attained, that there should be a period of absolute rest in order to prepare for the next stage. Now, in considering what the Attorney-General has been good enough to say, I may consider it as if I were his client. He has said many things of me which, as his client, I can only say have been as happily said as could be said. He has been speaking of me as a judge. I can only say that for once he has not convinced me, by what he has said, that what he has said is correct. I may say this as to my own method since I was a judge—I feel confident that never on any one single occasion at any period of my judicial career have I done anything except try, from the beginning of each case until it was ended, to get at the truth of the matter. I have never allowed my attention to be called to anything else in Court. I have listened to witnesses; I have listened to arguments, and I have tried to test them and to consider them as they went on; and my great desire was, first of all, to come to a right determination as to what was the truth of the case in respect of which the parties were in dispute. I speak, of course, of civil actions. I have never been an enemy to the preliminary mode of investigation before the case comes into Court. I have been a supporter of the means by which the parties can bring themselves to the real issue. I think that those means are sometimes, and not seldom, abused; that people will take objections and ask questions and insist on rights which are not wanted in the particular case. But, however that may be, when once the case has come into Court my desire and effort have been to get at what is the true state of things; and whether there has been a proper compliance with the preliminary steps at that moment has become entirely immaterial. I never could bring myself to think that a judicial tribunal ought to allow a person's rights to be overthrown because there had been some mistakes made in the preliminary steps or investigations by those who were his advisers. Well, having got, as I have tried to get, at the true facts of the case, I then had to consider what was the law. I am speaking, as I have said, of civil

actions and disputes between parties. The duty of the judge is to find out what is the rule which people of candor and honor and fairness in the position of the two parties would apply in respect to the matter in hand. That is the common law of England, and there is no other law. It is not only the common law, but if we go to equity it is the same thing. The law of England is not a science; it is a practical application of the rules of right and wrong to the particular case before the Court. And the canon of law is that that rule should be adopted and applied to the case which people of honor and candor and fairness in such a transaction would apply each to the other. Now if that be so, if any supposed rule of law is put forward which would prevent the rule of right being applied, the supposed rule of law must be wrong; and if it ever be alleged that the law will prevent the truth being established and oblige the Court to say that that is not true which is true—if ever any such rule of law is attempted to be put forward, it must be wrong, and I have always said so. Now, what the rules of right and wrong in the particular case are must be determined in each particular case; but nobody can have read the reports of decisions of great judges from the earliest times in England without trying to find in those reports the mode and manner in which those judges have stated the rule of conduct of the Court, and that is what is called authority. But no decision—at least, in my opinion—of any judge as to the rule of law other than in an Act of Parliament can compel any Court now to say that they were prevented from deciding that to be true which was in reality true; there is no such thing in the law as a rule which says that the Court shall determine that to be true which the Court believes and knows to be untrue. Now, those being the rules of conduct which I have laid down for myself, I have tried to carry those rules through. I have been assisted, as you must all know, by judges sitting with me whose aid has been to me inestimable. I have been fortunate enough to retire, as I say, with a mark, an unusual mark, given to me—a mark which I think has never been given to any judge for mere legal conduct since the time of Lord Coke. I have received that mark from the Queen, and that mark can leave nothing for me to wish. I now have received from you this kind greeting, and I have only one painful word, as the Attorney-General has said, to use from beginning to end, and that is to say to all of you, Good-bye.

His lordship then bowed to the Bar, and, having shaken hands with some of the judges, retired amidst hearty hand-clapping on the part of the Bar and others in Court.

“My first client,” said M. Chaix d’Est Auge at the dinner table of a prosperous bourgeois, “was the greatest scoundrel unhung—a bad egg any way you took him. But I got him off. He was the black sheep of a good family, and his conviction would have made a great scandal.” Towards the close of the dinner a pompous, important personage entered, and as the host was about to introduce him to the advocate, he said: “Oh, I need no introduction to M. d’Est Auge. I was his first client.”

RECENT UNITED STATES DECISIONS.

Carrier.—An express company delivering a package of money to an imposter who represents that he is the consignee is held, in *Pacific Exp. Co. v. Shearer* (Ill.) 37 L.R.A. 177, to be not relieved by the fact that the imposter telegraphed for the money in the name of the consignee and himself received the reply, although the sender of the money believed the telegram came from the person whose name was signed to it. The authorities, which are somewhat in conflict, as to the effect of delivery by a carrier to an imposter, are reviewed in the note to the case.

Contract.—An agreement to establish a railroad dépôt at a certain place in consideration of a right of way is held, in *Texas & P. R. Co. v. Scott* (C. C. App. 5th C.) 37 L.R.A. 94, to be satisfied by maintaining the dépôt there for thirty-six years, although it is then removed on account of the exigencies of business.

A member of a club who shares in a "take out" or percentage of the winnings of gambling which the club receives from the games played there, and in which he to some extent acts as manager, is held, in *White v. Wilson* (Ky.) 37 L.R.A. 197, to be such a joint wrongdoer with the winner that he cannot recover on a note for money loaned for use in the game.

A contract by attorneys at law for services to prevent the finding of an indictment is held, in *Weber v. Shay* (Ohio) 37 L.R.A. 230, to be illegal and void, irrespective of their belief in the guilt of the accused.

Criminal law.—To constitute larceny of money found in a pocketbook the intent to appropriate it is held, in *State v. Hayes* (Iowa) 37 L.R.A. 116, not necessarily to exist at the time when the pocketbook was found, if the fact that it contains money is not then known. It is sufficient if the intent is formed when the money is discovered. The authorities on the rights and liabilities of the finder of property are reviewed in a note to the case.

Evidence.—The admissibility of declarations of a sick person to his physician is held, in *Williams v. Great Northern R. Co.* (Minn.) 37 L.R.A. 199, to be limited to statements of existing pain or of other existing symptoms, and exclusive of descriptions of past symptoms or past experiences. It is also held that statements to a physician by a person respecting his own virility are not admissible in evidence in his own favor, but are mere hearsay.

Insurance.—An agreement by an insurance broker that double lines of insurance shall not be taken in the same company by his principal is held, in *John R. Davis Lumber Co. v. Hartford F. Ins. Co.* (Wis.) 37 L.R.A. 131, to be binding on the principal—especially where he takes the benefit of the policy after knowledge of the facts.

Insanity.—An insane delusion is held, in *Re Kimberly* (Conn.) 37 L.R.A. 261, to be a false belief for which there is no reasonable foundation, and which would be incredible under the given circumstances to the same person if of sound mind, and concerning which his mind is not open to permanent correction through evidence or arguments. The numerous cases on the question what constitutes insane delusions are collected in a note to this case.

Lease.—A landlord's duty to use reasonable care to protect the property of his tenant from injury by the elements while repairing a roof or putting on a new one at his request is held, in *Wertheimer v. Saunders* (Wis.) 37 L.R.A. 146, to be one which he cannot delegate to an independent contractor so as to be relieved from liability if the contractor is negligent.

Partnership.—On the dissolution of a partnership by the death of a member, real estate is held, in *Steinberg v. Larkin* (Kan.) 37 L.R.A. 195, to be regarded as personal property for the purpose of closing up the business, and on a settlement it may pass to the surviving partner without any formal conveyance.

Schools.—A rule of the board of health excluding from public schools unvaccinated children who have the right to attend the schools is held, in *State, ex rel. Adams v. Burdge* (Wis.) 37 L.R.A. 157, to be void unless authorized by statute.

The liability of a school corporation organized solely for the public benefit, to an action for injuries caused by the negligence of its officers or agents, is denied in *Freel v. Crawfordsville* (Ind.) 73 L.R.A. 301, unless such action is expressly authorized by statute, or authority to raise money to pay such claims is given. In a note to the case are reviewed the authorities on the liability of a school district or school corporation to an action for damages from negligence.

Warehouse receipts.—So-called storage warrants issued by a furnace company which is not in the warehousing or storage business, for pig iron in its yard, are held, in *Geilfuss v. Corrigan* (Wis.) 37 L.R.A. 166, insufficient to constitute negotiable warehouse certificates, although they are in the usual form thereof.

Water course.—The artificial state or condition of flowing water, founded upon prescription, is held, in *Smith v. Youmans* (Wis.) 37 L.R.A. 285, to be a substitute for the natural condition, such that parties may have a right to insist on the maintenance of the new condition. Therefore owners of land on the shore of a lake which has been raised by a dam so that their property has been benefited by covering swampy shores, are held to have an easement on their part after the owner of the dam has acquired a prescriptive right to maintain it, so that, so long as he does not surrender or abandon his easement to maintain the lake above its natural level, they may insist on his maintaining the dam at its full height.

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